la liberté de presse au québec

3

les aspects juridiques du secret professionnel du journaliste

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19 avril 1972

136062

Assemblée nationale

La Commission parlementaire spéciale sur les problèmes de la liberté de presse

NOTE PRELIMINAIRE

Nous désirons remercier Me Denis Ferland et Me Anne Turgeon pour le travail remarquable qu'ils ont effectué dans le cadre de cette recherche. Nous tenons à souligner l'intérêt constant qu'ils y ont porté et la qualité exceptionnelle de leur collaboration.

De plus, nous ne voulons passer sous silence la coopération du Département de Journalisme et Information de l'Université Laval.

Enfin, nous adressons nos remerciements les plus sincères à Mme Kathleen C. Dorion qui s'est dévouée sans relâche à la rédaction de ce rapport.

H.R.

K.D.B.

Québec, le 19 avril 1972.

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INTRODUCTION

INTRODUCTION

Si l'on analyse le déroulement des litiges soumis à nos tribunaux civils de première instance, l'on constate qu'ils se divisent en deux phases bien précises: la procédure écrite et l'enquête. Durant la première étape, les parties présentent par écrit leur version des faits et en tirent des conclusions: ceci permet de circonscrire les débats et de bien faire connaître les prétentions que chacun tentera de prouver lors de l'enquête. La deuxième étape, qui se déroule devant un juge, consiste en l'audition des témoins qui viennent reconstituer les événements tels qu'ils les ont perçus.

On retrouve un cadre similaire devant les juridictions criminelles, en ce sens que le procès débute par une procédure écrite - la sommation ou l'acte d'accusation - et qu'elle est suivie d'une audition de témoins devant le tribunal.

En vue de permettre aux parties de soumettre au tribunal la meilleure preuve possible de leurs prétentions, le législateur leur a octroyé le pouvoir d'assigner à comparaître tous les témoins dont elles veulent requérir la présence et de les forcer à rendre témoignage sur les faits dont elles ont pris connaissance. Ainsi, lorsqu'une personne est appelée à rendre témoignage, elle doit le faire, sous peine de sanction.

En matière civile, cette obligation est prescrite par les articles 295 et 313 du Code de procédure civile qui se lisent comme suit:

> Art. 295 C.P.: "Toute personne est apte à déposer en justice, sauf si, en raison de sa condition physique ou mentale, elle n'est pas en état de rapporter des faits dont elle a eu connaissance; et toute personne apte à déposer peut être contrainte de le faire.
>
> La parenté, l'alliance, l'intérêt peuvent être causes de reproche contre un témoin, mais seulement quant au degré de crédibilité de son témoignage."

Art. 313 C.P.: "Le témoin qui, sans raison valable, refuse de répondre, se rend coupable d'outrage au tribunal, de même que celui qui, ayant en sa possession quelque objet d'intérêt pour le litige, refuse de le produire."

D'autre part, le Code criminel du Canada, aux articles 626 et 628, permet que l'on assigne toute personne "susceptible de fournir quelque preuve essentielle", soit oralement, soit par la production de documents. D'autre part, la Loi sur la preuve au Canada, qui s'applique à toutes les procédures criminelles et civiles ainsi qu'à toutes les autres matières sur lesquelles le Parlement du Canada a juridiction, établit, à l'article 3, que:

"Nul n'est inhabile à rendre témoignage pour cause d'intérêt ou de crime."

Cette règle de contraignabilité existe dans tous les systèmes judiciaires. Ainsi, par exemple, on la retrouve en Angleterre - depuis 1562 - (1), aux Etats-Unis par transposition de la "common law" anglaise (2), en France (3), ainsi que dans les autres provinces du Canada (4).

Cependant, il existe certaines exceptions à cette règle. Celles-ci peuvent reposer sur l'inhabilité de la personne à témoigner ou sur le privilège que le législateur lui octroie de ne pas témoigner.

Ce privilège est accordé normalement lorsque le témoin est un professionnel qui travaille à la poursuite du bien commun. En effet, l'exercice de certaines professions exige que l'on accorde une protection aux communications faites par un citoyen à une personne qui lui fournit certains services nécessaires à sa vie, à son bien-être ou susceptibles

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(1) Act of 5 Eliz. I, ch. 9, article 12 (1562).
(2) Voir: Blair v. United States, 250 U.S. 273, 281 (1919).
(3) Art. 269 C.P.
(4) Alberta: 1955, c. 102, a. 4; Colombie Britannique: 1960, c. 134, a. 4; Ile du Prince Edouard: 1951, c. 52, a. 2: Manitoba: 1954, c. 75, a. 4; Nouveau-Brunswick: 1952, c. 74, a. 2; Nouvelle-Ecosse: 1954, c. 88, a. 40: Ontario: 1970, c. 151, a. 6; Saskatchewan: 1965, c. 80, a. 32; Terre Neuve: 1952, c. 120, a. 7.

de régler les difficultés qu'il rencontre dans ses relations avec ses concitoyens.

Toutes les sociétés occidentales reconnaissent que, pour l'efficacité des rapports entre les confidents et des personnes recevant, à titre professionnel, leurs confidences, l'on fasse une entorse à la règle générale selon laquelle toute personne peut être contrainte de témoigner devant les tribunaux. Il est vrai que, sans cette exception, ces relations seraient empreintes de méfiance susceptible de rendre totalement inefficace le dialogue entre ces personnes.

D'autre part, ce climat de confiance sert, non seulement les intérêts des personnes directement concernées, mais également ceux de la société toute entière. Autrement, tous les citoyens vivraient dans la crainte que la société elle-même n'exerce des représailles pour des gestes qu'ils auraient posés ou des paroles qu'ils auraient prononcées.

A la lecture des textes de loi, l'on constate que les législateurs ont édicté deux types de règles pour assurer la protection des secrets ainsi dévoilés. D'une part, ils ont imposé à certaines catégories de professionnels le devoir de taire des informations et, d'autre part, ils ont accordé à ces personnes le privilège de ne pas témoigner devant les tribunaux.

Par contre, les législateurs et les tribunaux ont cru essentiel, pour une meilleure administration de la justice, de limiter le droit au secret à certains types de professions. De plus, même lorsque ce droit est accordé, on l'assortit souvent de conditions qui en restreignent la portée.

Enfin, le nombre de professions bénéficiant de ce privilège varie selon les Etats. Si le législateur juge préférable de mettre l'emphase sur la liberté de l'individu, il sera porté à accorder ce privilège à un nombre plus grand de professions. Cependant, s'il croit que la cohésion à l'intérieur de la société sera mieux assurée par une meilleure administration

de la justice, il sera porté à restreindre le privilège afin que les juges possèdent un maximum d'informations lorsqu'ils doivent trancher un litige.

Par conséquent, la possibilité qu'une personne puisse se soustraire à l'obligation de témoigner crée un conflit entre deux principes d'ordre public: la sanction de la règle de droit et la protection de l'intimité des individus.

Dans la première partie de ce rapport, nous avons jugé utile de présenter l'état actuel du droit concernant les communications privilégiées en choisissant comme base les professions à qui nos législateurs québécois et canadien reconnaissent un tel privilège. De plus, nous mentionnons l'existence d'autres types de confidences qui sont admises dans notre droit. Enfin, nous présentons l'état de la législation, dans un certain nombre de pays, concernant le privilège du journaliste.

Dans une deuxième partie, nous analysons la nature et les conditions d'exercice du privilège du journaliste et nous terminons par une troisième partie, dans laquelle nous formulons certaines hypothèses susceptibles de retenir votre attention.

PARTIE I - ETAT ACTUEL DU DROIT CONCERNANT LES COMMUNICATIONS CONFIDENTIELLES

Nous avons regroupé cet exposé sous trois titres:

A- Les professions de service

- Le conseiller juridique.
- Le professionnel de la santé.
- L'aviseur religieux.

B- Autres privilèges

- L'huissier.
- Le conjoint.
- L'informateur de police.
- Le fonctionnaire.

C- Le journaliste

A- LES PROFESSIONS DE SERVICE

Puisque notre recherche ne porte pas principalement sur ce type d'activités professionnelles, nous nous limiterons à un exposé schématique de l'état du droit québécois et de la "common law" dans ce domaine.

1- LE CONSEILLER JURIDIQUE

a) En droit québécois

Dans notre droit, le secret professionnel du conseiller juridique, l'avocat ou le notaire, est protégé par le Code de procédure

civile et par les lois qui régissent ces deux professions.

L'article 308 C.P. prescrit que:

"De même, ne peuvent être contraints de divulguer ce qui leur a été révélé confidentiellement en raison de leur état ou profession:

1- Les prêtres et autres ministres du culte;

2- Les avocats, les notaires, les médecins et les dentistes; à moins, dans tous les cas, qu'ils n'y aient été autorisés, expressément ou implicitement, par ceux qui leur ont fait ces confidences;

3- Les fonctionnaires de l'Etat, pourvu que le juge soit d'avis, pour les raisons exposées dans l'affidavit du ministre ou du sous-ministre de qui relève le témoin, que la divulgation serait contraire à l'ordre public."

Les juristes bénéficiaient d'une protection, dès la première codification de la procédure, en 1867. Cependant, ce n'est qu'en 1966 que fut inclue dans le Code la possibilité pour le confident de délier le professionnel de son secret.

Alors que le Code de procédure civile accorde à l'avocat et au notaire le privilège de ne pas témoigner devant les tribunaux, la Loi du Barreau et la Loi de la Chambre des Notaires imposent aux membres de ces corporations l'obligation de garder le silence.

La Loi du Barreau (5), à l'article 131, prévoit que:

"1- L'avocat doit conserver le secret absolu des confidences qu'il reçoit en raison de sa profession.

2- Cette obligation cède toutefois dans le cas où l'avocat en est relevé expressément ou implicitement par la personne qui lui a fait ces confidences."

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(5) 15-16 Eliz. II, (1966-67), c. 77.

La Loi du Notariat (6) à l'article 15, énonce la règle suivante:

> "Les principaux devoirs d'un notaire, outre ceux qui lui sont imposés par la présente loi, sont:
>
> a) de ne pas divulguer les faits confidentiels dont il a eu connaissance lors de l'exercice de sa profession, à moins qu'il n'ait été expressément ou implicitement autorisé à le faire par ceux qui lui ont fait ces confidences."

Nos tribunaux (7) se sont prononcés à plusieurs reprises et les articles de doctrine (8) abondent sur ce sujet. Ils mettent en lumière les deux aspects fondamentaux du secret des conseillers juridiques: l'obligation au silence et la protection judiciaire de l'information confidentielle.

b) En "common law"

Le statut des communications privilégiées en "common law" revêt un intérêt capital pour nous puisqu'il régit l'octroi de ce privilège dans les secteurs de la Législation fédérale qui s'appliquent au Québec. En effet, c'est la "common law" et non pas notre droit civil, qui sert à interpréter notamment les dispositions des lois en matières criminelles et fiscales.

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(6) 16-17 Eliz. II, (1967-68), c. 70.

(7) Parmi les arrêts les plus importants: Montreal Street Railway Co. v. Feigleman, (1912) 22 B.R. 102; Magnan v. Hamel, 1944 B.R. 514; Sa Majesté la Reine v. Sauvé, 1965 C.S. 129; Barwick & Sons Ltd. v. Farmer's Merchants Trust Co., 1968 R.P. 59; Brossard v. Sous-Procureur Général du Canada, 1971 C.S. 344.

(8) Publications récentes: François AQUIN. "Le secret professionnel du notaire", (1970) 73 R. du N. 207. J.L. BAUDOUIN. "Le secret professionnel du conseiller juridique", (1963) 65 R. du N. 483; Secret professionnel et droit au secret dans le droit de la preuve, Librairie Générale de Droit et de Jurisprudence, Paris, 1965; "Nouveaux aspects du secret professionnel", (1965) 25 R. du B. 562. C.A. BERTRAND. "Secret professionnel et notions connexes", (1968) 28 R. du B. 69. Jules DESCHENES. "Ethique, impôt, crime et secret professionnel", (1968) 28 R. du B. 677.

Dans le droit fédéral canadien (9), dans toutes les juridictions des Etats-Unis (10) et dans les provinces de "common law" au Canada (11), la protection du secret professionnel du conseiller juridique est accordée, en vertu du principe du "attorney-client privilege" reconnu en droit anglais depuis le seizième siècle (12).

2- LE PROFESSIONNEL DE LA SANTE

a) En droit québécois

Comme nous l'avons vu, à la page 6, le secret professionnel du médecin et du dentiste est protégé devant les tribunaux civils de la même manière que celui de l'avocat et du notaire (13). Il faut noter que ce type de protection n'existait pas de façon formelle dans le Code de procédure civile, avant 1966 (14).

Par contre, le devoir de garder le silence est imposé au médecin depuis 1909 (15), et la Loi Médicale, au paragraphe 2 de l'article 60 (16), prescrit que:

> "2. Un médecin ne peut être contraint à déclarer ce qui lui a été révélé à raison de son caractère professionnel."

D'autre part, la Loi des dentistes (17) déclare que le fait de dévoiler le secret professionnel constitue un acte dérogatoire à l'honneur professionnel.

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(9) Re Kask, (1966) 49 C.R. 209 (B.C.).
(10) "Functional overlap between the lawyer and other professionals", 71 Yale L. J. 1226 (1962).
(11) C.L. DUBIN. "Preliminary problems", dans Lectures of the Law Society of Upper Canada, 1969, p. 3.
(12) Berd v. Lovelace, Cary 62, 21 Ens. Rep. 33 (Ch. 1577).
(13) Art. 308 C.P.
(14) Voir Art. 332 C.P. (1897).
(15) 9 Edw. VII, c. 55, a. 1.
(16) S.R.Q. 1964, c. 249.
(17) S.R.Q. 1964, c. 253, a. 122, par. 2.

Jusqu'en 1966, le médecin n'était théoriquement pas protégé aussi bien que le conseiller juridique, devant les tribunaux, puisque cette profession n'était pas inclue dans la liste de celles que protégeait l'article 332 de l'ancien Code de procédure civile. Toutefois, les tribunaux ont constamment accordé une protection semblable aux médecins, malgré cette "inadvertance" du législateur (18).

Nous nous permettons de souligner certaines incohérences dûes à des lacunes d'ordre législatif. Dans les lois régissant les professions d'optométristes et d'opticiens (19), d'infirmières (20) et même de vétérinaires (21), la violation du secret professionnel constitue un acte dérogatoire. Cependant, ces personnes ne bénéficient d'aucun privilège devant les tribunaux civils puisque leur profession n'apparaît pas à l'article 308 C.P.

D'autre part, le psychologue, le travailleur social et le psychanaliste non médecin ne sont pas légalement tenus au secret professionnel et ne peuvent conséquemment l'invoquer devant les tribunaux.

b) En "common law"

Le secret médical n'est pas reconnu en "common law" ni dans le droit fédéral canadien. Cette règle de droit n'a pas changé depuis l'affaire "The Duchess of Kingston," survenue en Angleterre, en 1776 (22). Au Canada, le droit criminel, le droit fédéral et celui des

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(18) Voir: J.L. BAUDOUIN. "Le secret professionnel du médecin - son contenu - ses limites", (1963) 41 C.B.R. 491; A.G. CORNEAU. "Secret professionnel et propriété du dossier médical hospitalier: un nouveau débat", (1969) 29 R. du B. 589; Descarreaux v. Jacques, 1969 B.R. 1109.

(19) S.R.Q. 1964, c. 257, a. 46, par. 5.

(20) S.R.Q. 1964, c. 252, a. 50, par. 2.

(21) S.R.Q. 1964, c. 259, a. 48.

(22) Duchess of Kingston Case (1776), 20 How. State Tr. 355; voir également Wilson v. Raskall, (1792) 4 T.R. 753; Wheeler v. Le Marchant, (1881) L.R. 17 Ch. D. 675.

autres provinces ne reconnaissent en aucune façon le privilège du médecin assigné à comparaître comme témoin. Freedman (23) souligne que, en pratique, le juge sera porté à dispenser le médecin de témoigner lorsque la question n'est pas essentielle au déroulement du litige; mais, dans ce cas, "the doctor merely receives a dispensation by courtesy".

Aux Etats-Unis, trente-cinq Etats accordent un privilège au médecin; cinq le reconnaissent au psychiatre et trente au psychologue (24). Dans tous les autres cas, la "common law" s'applique.

Certains suggèrent que le législateur étende aux autres professions paramédicales le champ d'application du privilège accordé aux médecins. Ces propositions sont souvent reçues avec méfiance, parfois par les professionnels impliqués eux-mêmes (25).

3- L'AVISEUR RELIGIEUX

a) En droit québécois

Le prêtre et le ministre du culte jouissent d'un privilège absolu devant les tribunaux civils du Québec. L'article 308 C.P. reconnaît, en effet, l'obligation au secret qu'impose au prêtre le droit canon; aussi n'est-il prévu aucun système selon lequel l'aviseur religieux pourrait être contraint à témoigner comme tout autre témoin sur des confidences qu'il aurait reçues.

L'absolutisme de cette règle a pour effet d'écarter tout problème d'interprétation devant les tribunaux.

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(23) Samuel FREEDMAN. "Medical privilege", (1954) 32 C.B.R. 1.

(24) Voir Gerd SCHROETER. "Protection of confidentiality in the Courts: The Professions", Social Problems 16: 376 (1969). Les tableaux des pages 380 et 381 sont reproduits en annexe.

(25) Voir "Functional Overlap between the lawyer and other professionals", 71 Yale L. J. 1226 (1962), à la page 1258.

b) En "common law"

Le secret de la confession, aboli à la suite de la Réforme, n'est pas officiellement reconnu par la majorité des juridictions de "common law" au Canada (26). Par contre, quarante-sept Etats américains l'admettent (27).

Toutefois, il s'agit d'un problème beaucoup plus théorique que pratique puisque, par exemple, il n'a jamais été soulevé dans une poursuite pénale, dans notre pays. Le juge Irénée Lagarde (28) croit que, si la question se présentait, "tous les tribunaux du pays reconnaîtraient le caractère privilégié de la confession d'un pénitent à un prêtre ou à un ministre du culte".

B- AUTRES PRIVILEGES

1- Outre le privilège accordé à certains professionnels, le Code de procédure civile consacre la protection de certaines communications confidentielles:

1- celles que reçoit un huissier, après la signification du bref d'assignation (29);
2- celles que le conjoint d'un témoin aurait faites pendant le mariage (30).

Ce même privilège est prévu dans la Loi de la Preuve au Canada (31) et dans les lois de toutes les provinces de common law à l'exception de l'Ile du Prince-Edouard (32).

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(26) Seule la province de Terre-Neuve le reconnaît: 1952 S.N., c. 120, a. 6.
(27) Voir Tableau de Schroeter, en annexe.
(28) Irénée LAGARDE. Droit pénal canadien, Wilson & Lafleur, Montréal, 1962, à la page 1505. Voir également: Cronkwright v. Cronkwright, (1970) 3 O.R. 784.
(29) Art. 297 C.P.
(30) Art. 307 C.P.
(31) S.R.C. 1970, c. E-10, a. 4 (3).
(32) Alberta: 1955, c. 102, a. 10; Colombie-Britannique: 1960, c. 134, a. 9; Manitoba: 1954, c. 75, a. 10; Nouveau-Brunswick: 1952, c. 74, a. 10; Nouvelle-Ecosse: 1954, c. 88, a. 45; Ontario: 1970, c. 151, a. 11; Saskatchewan: 1965, c. 80, a. 34; Terre-Neuve: 1952, c. 120, a. 4.

2- L'informateur de police jouit d'un statut particulier devant les tribunaux, en matière de droit fédéral au Canada. Selon Lagarde, ce privilège a pour effet de prohiber l'identité de l'informateur, la nature du renseignement et les moyens par lesquels les informations ont été obtenues (33).

Le bien-fondé d'une telle protection est justifié par Wigmore qui souligne ainsi la nécessité d'encourager de telles communications:

> "To encourage him in performing this duty without fear of consequence the law holds such information among the secrets of State... will not compel or allow the discovery of such information either by the subordinate officer to whom it is given by the informer himself, or by any other person without the permission of the Government." (34)

Dans Humphrey v. Archibald (35), le tribunal a fait de ce privilège une question d'ordre public qui ne peut alors être matière à discrétion pour le juge, sauf lorsque la révélation du nom de l'informateur devient nécessaire afin d'établir l'innocence d'un accusé. Lorsque cette hypothèse se présente, doit avoir préséance la règle selon laquelle un innocent ne doit pas être condamné lorsque sa non-culpabilité peut être prouvée, à celle qui accorde un privilège à l'informateur de police.

Enfin, notons que ce dernier ne jouit d'aucune protection statutaire dans toutes les provinces du Canada.

3- Le fonctionnaire peut également être protégé. En effet, le bon fonctionnement de la société requiert que, au nom de l'ordre ou de la sécurité publique, des règles de droit permettent d'assurer la plus parfaite confidentialité à certains documents et renseignements que possède l'Etat.

Toutefois, la communication privilégiée que reçoit le fonctionnaire - ou l'Etat - est d'un type différent de celui qu'un confident fait à

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(33) Lagarde, op. cit. p. 1505.
(34) Wigmore on Evidence, vol. 8, p. 752, cité dans Regina v. Blain, (1960) 33 C.R. 217, à la page 219.
(35) (1893) 20 O.A.R. 269.

un professionnel. Il est vrai que l'ensemble des membres d'une communauté a le droit d'exiger que le plus grand nombre possible de citoyens témoignent devant les tribunaux. Il est également vrai que certaines communications doivent être privilégiées, comme nous l'avons vu à propos des professions de service.

D'autre part, même s'il faut que certaines informations échangées entre un citoyen et l'Etat soient gardées confidentielles, il faut cependant que l'on évite que l'Etat soit soustrait à tout contrôle en se retranchant derrière ce principe de confidentialité des informations qu'il détient.

a) En droit québécois

L'obligation au secret du fonctionnaire, hors Cour, découle du serment ou de l'affirmation de discrétion qu'il doit prêter avant d'entrer en fonction (36). De plus, le citoyen qui se soumet aux lois de la province est protégé de maintes façons contre toute indiscrétion, quant aux renseignements qu'il fournit à l'Etat (37).

Devant les tribunaux, le fonctionnaire est soumis aux prescriptions de l'article 308 C.P. Ainsi, il peut se soustraire à l'obligation de témoigner"... pourvu que le juge soit d'avis, pour les raisons exposées dans l'affidavit du ministre ou du sous-ministre de qui relève le témoin, que la divulgation serait contraire à l'ordre public".

Selon cet article, ce n'est pas le fonctionnaire qui bénéficie du privilège de ne pas rendre témoignage, c'est l'Etat en tant que protecteur de l'intérêt public. D'autre part, cette protection est

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(36) Loi du Ministère de la Fonction publique, S.Q. 1969, c. 14, a. 47.
(37) Loi du Bureau de la Statistique, S.R.Q. 1964, c. 207, a. 13, 14, 15.
Loi de l'Impôt provincial sur le Revenu, S.R.Q. 1964, c. 69, a. 152.
Loi des Droits sur les Successions, S.R.Q. 1964, c. 70, a. 57.
Loi de l'Impôt sur la vente au détail, S.R.Q. 1964, c. 71, a. 18.
Loi de l'Impôt sur le tabac, S.R.Q. 1964, c. 72, a. 16.
Loi du Protecteur du citoyen, S.Q. (1968) 17 Eliz. II, c. 11, a. 33, 34.

sensiblement mitigée par deux restrictions: les supérieurs du fonctionnaire doivent, sous serment, attester que l'intérêt public exige le secret et, en outre, le juge saisi de la déclaration du ministre ou du sous-ministre peut exercer un contrôle judiciaire sur telle déclaration (38).

b) En droit fédéral canadien

Le fonctionnaire fédéral, lorsqu'il entre à l'emploi de la Fonction publique, prête un serment similaire à celui que l'on exige de son homonyme québécois (39).

Devant nos tribunaux, il est soumis aux règles du Code de procédure civile de la province. En matière criminelle, son privilège est prévu par la Loi de la Preuve du Canada qui, à l'article 37, soumet le fonctionnaire fédéral à notre Code de procédure civile (40).

C- LE JOURNALISTE

Dans cette première partie de notre rapport, qui concerne l'état actuel du droit, nous tenterons de présenter un aperçu le plus complet possible du sort que l'on réserve aux communications privilégiées reçues par le journaliste.

Cependant, tel que convenu dans l'entente que nous avons signée, nous avons effectué des recherches exhaustives sur ce sujet dans les pays suivants: Canada, Etats-Unis, Angleterre, France et Belgique.

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(38) Pour un exposé complet sur ce privilège, voir: Patrice GARANT. "Le secret professionnel du fonctionnaire au Québec", (1967-68) 9 C. de D. 779.

(39) Loi sur l'emploi dans la Fonction publique, S.R.C. 1970, c. P-32, a. 23.

(40) S.R.C. 1970, c. E-10. De plus, voir GARANT, loc. cit. p. 787, et La Reine v. Sauvé, 1965 C.S. 129, à la page 134.

Dans le cas d'autres Etats, nous vous soumettons l'information recueillie dans un rapport publié par l'International Press Institute, en 1962.

Nous diviserons donc nos propos en trois parties:

1- Le privilège du journaliste, selon le rapport de l'International Press Institute, en 1962, à l'exception des pays que nous avons convenu d'étudier de façon particulière.

2- Les juridictions qui ne reconnaissent pas le privilège du journaliste.

3- Les juridictions qui reconnaissent le privilège du journaliste.

1- Le rapport de l'IPI (41)

En 1962, le journaliste ne jouissait d'aucune protection devant les tribunaux, dans les pays suivants:

Les pays d'Amérique Centrale et d'Amérique Latine (42), Italie (43), Japon (44), Pakistan (45) et Suisse (46).

Dans deux pays de common law, l'Australie (47) et l'Inde (48), le journaliste ne bénéficie pas de privilège, à ce titre; il peut cependant être dispensé de témoigner dans des limites similaires à celles que nous verrons au sujet de l'Angleterre.

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(41) "Professional Secrecy and the Journalist", International Press Institute, Zurich, 1962.
(42) Op. cit. p. 19.
(43) Op. cit. p. 93.
(44) Op. cit. p. 105.
(45) Op. cit. p. 133.
(46) Op. cit. p. 151.
(47) Op. cit. p. 23, et Attorney-General v. Clough, (1963) 1 Q.B. 773 (Angleterre), à la page 790.
(48) Op. cit. p. 89.

En Finlande (49) et en Hollande (50), l'on note l'absence presque complète de jugements sur cette question; ce qui laisse entrevoir l'existence d'une certaine forme d'entente tacite.

Au Danemark, il existe une protection pour l'éditeur seulement (51).

Cinq pays reconnaissent légalement le privilège du journaliste, soit l'Allemagne de l'Ouest (52), l'Autriche (53), la Norvège (54), les Philippines (55) et la Suède (56). Toutefois, seule l'Autriche semble l'accorder sans aucune restriction. Dans les autres juridictions, on limite la protection soit en indiquant les circonstances où elle est reconnue, soit en attribuant aux tribunaux un pouvoir discrétionnaire.

2- Les juridictions qui ne reconnaissent pas le privilège du journaliste

a) Le CANADA

Dans notre pays, aucune protection n'est accordée au journaliste appelé à témoigner, à ce titre, devant les tribunaux.

Au Québec, les Statuts et Règlements de la Fédération Professionnelle des Journalistes du Québec ainsi que la Constitution du Conseil de Presse contiennent des dispositions ayant pour objet de protéger directement ou indirectement le journaliste. La Fédération, à l'article 3, s'est fixé comme but:

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(49) Op. cit, p. 61.
(50) Op. cit, p. 113.
(51) Op. cit, p. 53.
(52) Op. cit, p. 77.
(53) Op. cit, p. 33.
(54) Op. cit, p. 123.
(55) Op. cit, p. 139.
(56) Op. cit, p. 145.

"c) Contribuer à assurer la protection du droit du public à une information honnête, complète et de qualité, et le droit du journaliste à la liberté d'expression".

Le Conseil de Presse est plus précis, à l'article 2 de sa Constitution:

"Article 2: OBJETS

Le Conseil a pour objet:

1- de protéger la liberté de presse au Québec afin d'assurer au public son droit à l'information;

2- veiller au libre accès de la presse aux sources d'information et à la protection des dites sources."

Par contre, même si, à notre connaissance, des juges ont permis, à deux reprises, que des journalistes ne témoignent pas devant les tribunaux, nous sommes portés à croire que ces deux cas constituent des exceptions à la règle générale.

Lors de l'enquête de la Commission de Police sur la conduite des policiers de Montréal, lors de leur arrêt de travail du 7 octobre 1969, le juge Ludovic Laperrière, qui présidait l'enquête, a permis à un caméraman de ne pas rendre témoignage. De plus, il a accepté que les films qui avaient alors été réalisés ne soient pas versés au dossier, en déclarant que "le droit des communications devait être protégé"(57). Nous avons l'impression que le témoignage du caméraman ne constituait pas un élément de preuve essentiel dans cette affaire.

Au procès que Pierre Vallières subissait pour le meurtre de Mlle Thérèse Morin, le juge Paul Miquelon a permis à un journaliste de ne pas dévoiler ses sources d'information. M. Gerald

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(57) Citation rapportée dans le journal Le Devoir, le 19 septembre 1970, p. 3.

Fitzgerald ("Fitz") avait écrit, dans sa chronique du 22 juillet 1966, "qu'un certain P.V. n'était pas étranger à cette affaire La Grenade qui avait coûté la vie à Mlle Thérèse Morin" (58). Appelé comme témoin de la Couronne, le 4 décembre 1969, Fitzgerald a insisté pour que ne soit pas révélé le nom de son informateur, que Vallières désirait connaître. Le juge Miquelon a acquiescé à la demande du journaliste. Il eût surement été intéressant de connaître les motifs d'ordre juridique sur lesquels le juge s'est appuyé pour rendre sa décision - Malheureusement, nous les ignorons.

Par contre, un journaliste du réseau anglais de Radio Canada, M. John Smith, au mois de mars 1969, a été condamné à sept jours de prison par le commissaire des incendies de Montréal, Me John MacDougall, pour avoir refusé de témoigner devant lui, lors d'une enquête sur certains attentats à la bombe. Ce journaliste avait préparé, pour la télévision, une émission sur le terrorisme au Québec et il avait donné aux personnes interviewées l'assurance que leur identité et le contenu de leurs communications ne seraient pas dévoilés.

Le commissaire MacDougall avait alors déclaré:

> "M. Smith, en rendant ma sentence, par suite de l'outrage au tribunal devant cette commission, je me suis efforcé de considérer tous les aspects de la question. Ce qui s'est passé ici, c'est le choc malheureux de deux obligations incompatibles.
>
> D'une part, j'ai l'obligation d'enquêter sur des incendies et des explosions afin d'assurer l'ordre public de cette ville et en remplissant cette obligation vous avez été cité devant cette commission et on vous demande des questions auxquelles vous avez refusé de répondre. Il est essentiel à l'administration de la justice que le respect dû à l'autorité des tribunaux et à la loi soit maintenu. Si cette autorité est supprimée, alors il n'y a plus d'autorité. On dit que si nous ne sommes pas gouvernés par la loi nous le serons par des tyrans.

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(58) Citation rapportée par M. Guy Deshaies, Le Devoir, 5 décembre 1969.

De votre côté, vous soutenez que le journaliste a le droit et l'obligation de garder secrètes des informations qu'il a reçues à titre confidentiel. Ce droit n'est pas reconnu par la loi et le journaliste, de même que n'importe quel citoyen doit témoigner dans des procès criminels ou dans une enquête sur des incendies ou des explosions ou devant un coroner relativement à un décès. Le journaliste ne bénéficie pas des exceptions qui existent en faveur des ministres du culte, des avocats dans des circonstances bien définies, des conjoints et de l'autorité publique.

Protéger la population contre le crime, les incendies ou les explosions l'emporte sur les intérêts de la presse. Le facteur de prévention et de protection contre d'autres crimes ne pourrait pas être mieux illustré que par la présente affaire, car nous ne nous occupons pas seulement d'un seul crime isolé mais d'une série d'attentats terroristes à la bombe.

Le fait pour un journaliste d'être obligé de répondre aux questions qui lui sont adressées ne viole pas la liberté de la presse. La presse est libre de publier ce qu'elle veut et de commenter comme elle l'entend. Mais il ne s'agit pas là d'une liberté absolue. Cette liberté est restreinte de multiples façons. La loi du libelle, les dispositions du Code criminel concernant la pornographie et la sédition ne sont que quelques exemples. Un journal est libre de publier n'importe quelle nouvelle mais si la matière de cette nouvelle concerne un décès, un incendie ou une explosion, le personnel de ce journal, comme n'importe quel autre citoyen, peut être interrogé. Personne n'est au-dessus de la loi." (59)

Cette décision de Me MacDougall reflète parfaitement, à notre avis, l'opinion des tribunaux des provinces canadiennes régies par la "common law". Le journaliste n'y jouit d'aucune protection statutaire, quant à ses sources: on le considère comme un témoin ordinaire (60).

Dans Wimser v. MacLean-Hunter Publishing Co. Ltd. and Fraser (61), le journaliste Blair Fraser, lors d'un interrogatoire préalable dans une action en libelle, avait refusé de révéler ses sources

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(59) Traduction libre de M. Normand Lépine - Le Devoir, 19 mars 1969.
(60) Quant aux droits et obligations de la presse, voir Banks v. Globe and Mail Limited, 1961 S.C.R. 474 et The Globe and Mail Limited v. Boland, 1960 S.C.R. 203.
(61) (1954) 4 D.L.R. 334 (B.C.C.A.).

en alléguant qu'il avait "a moral obligation to refuse to disclose the sources of his information". Sa prétention fut refusée par le juge, ce qui eut pour effet d'écarter la défense au mérite produite par le journaliste.

Un autre arrêt, rendu en Ontario, semble aller à l'encontre de la décision précédente. Dans Reid v. Telegram Publishing Co. Ltd, and Drea (62), une action en libelle avait été intentée contre un journal et un journaliste. A l'occasion d'une requête qui avait pour but de faire témoigner le journaliste au préalable, celui-ci refusa de dévoiler ses sources.

Le tribunal refusa au demandeur le droit de poser des questions à ce sujet, en notant que:

> "It would appear that normally the information sought by the plaintiff should be made available to him but it also appears from the cases that when the defendant is a newspaper... or reporter therefor, there has, over a long time, developed a rule of practice which is based substantially on the grounds of public policy, which has led to the refusal of such information as the plaintiff is now seeking on discovery".

Il semble donc que le juge ait voulu reconnaître au journaliste la protection qu'il demandait. Il convient toutefois de préciser deux aspects de cette décision. Premièrement, il s'agissait de questions posées lors d'un interrogatoire préalable à l'enquête; or rien, dans les règles de procédure, n'interdit au demandeur de revenir à la charge lors de l'enquête au mérite. En second lieu, il découlait des faits allégués dans la procédure écrite que, pour prouver leur bonne foi et la vérité des faits publiés, les défendeurs se devaient de produire comme témoins les informateurs de M. Drea, lors de l'audition. On comprend alors que, en refusant au demandeur le droit d'obtenir l'information à ce stade du procès, le juge ait affirmé que cette décision "is not too great a hardship on the plaintiff".

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(62) (1961) 28 D.L.R. 2d 6.

En 1964, dans des conditions semblables, le tribunal a encore refusé au journaliste le privilège de taire ses sources (63). Le juge, à l'appui de sa décision, cita un extrait d'un arrêt prononcé en Angleterre, en 1963, (64) sur lequel nous reviendrons ci-dessous.

Le 15 février 1972, le réseau anglais de Radio Canada fut forcé de soumettre à un tribunal un court métrage tourné par un de ses caméramen, lors de la manifestation organisée, le 25 octobre 1971, à l'occasion de la visite à Toronto du premier ministre de l'Union Soviétique, M. A. Kossyguine.

Deux dirigeants de cette Société avaient donné lecture d'une déclaration écrite dans laquelle ils s'opposaient à la projection de ce film en invoquant le droit du journaliste au secret de ses sources.

Le juge A. Vannini estima cependant que le droit du public à l'information avait préséance sur celui du journaliste au secret des sources. Il ajouta:

> "S'il est vrai que Radio Canada est fondée à se prévaloir de prérogatives journalistiques, les prérogatives du peuple du Canada sont encore plus fondées." (65)

b) L'ANGLETERRE

L'arrêt Attorney-General v. Mulholland et Attorney-General v. Foster (66), résume fort bien l'état actuel du droit dans ce pays. Dans ce jugement qui contient une excellente analyse de la jurisprudence, la Cour a statué que:

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(63) McConachy v. Times Publishers Ltd., (1964) 49 D.L.R. 2d 349.
(64) A.G. v. Mulholland and A.G. v. Foster, (1963) 2 Q.B. 477.
(65) Voir article de Dennis Bell, Le Soleil, 16 février 1972.
(66) (1963) 2 Q.B. 477.

> "There is no privilege known to the law by which a journalist can refuse to answer a question which is relevant and is one which in the opinion of the judge is proper for him to be asked."

Mulholland et Foster avaient été condamnés à l'emprisonnement pour avoir refusé de dévoiler leurs sources, lors d'un procès d'espionnage. Ils invoquèrent, comme motifs d'appel:

> "(1) that the judge was wrong in holding that the appellants, in refusing to answer the tribunal's questions, had committed any offence; (2) that the appellants as newspaper journalists were privileged from answering the questions which related to the sources of their information; (3) that the judge was wrong in holding that no such privilege existed; (4) that he was wrong in holding that the immunity of newspaper journalists from answering questions relating to their sources of information applied only to defamation actions and interlocutory applications and was only a rule of practice and not of law." (67)

Dans leur plaidoirie, les avocats de Mulholland ont soutenu qu'il est reconnu que la presse occupe un statut spécial qui lui confère des privilèges spéciaux et des immunités. Ils ont également prétendu que:

> "The authorities show that the privilege has passed from the realm of discretion and has become a rule of law. The court is dealing with a general principle." (68)

Puis ils invoquèrent les raisons selon lesquelles un journaliste ne doit pas être appelé à révéler ses sources:

- un journaliste est tenu à une obligation de secret et il serait déshonorant pour lui de dévoiler la source de son information;
- un journaliste a le devoir, envers les autres journalistes, de ne pas mettre en péril leurs chances futures d'obtenir de l'information;
- si telle révélation est faite, les journalistes vont mettre en péril leur propre position;

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(67) Ibid. p. 480.
(68) Ibid. p. 481.

- Leur répugnance à parler repose sur l'éthique de leur profession.

En réplique, les procureurs de l'attorney-general répondirent:

- les questions auxquelles Mulholland a refusé de répondre étaient "relevant and necessary";
- le droit au secret a été reconnu seulement dans les cas où l'intérêt public le requérait;
- les journalistes veulent le secret pour eux, non pas pour la protection de la source elle-même.

Lord Denning, dans son jugement, a statué que:

1- La question posée était "relevant and necessary".

2- La seule profession qui bénéficie du secret est la profession légale, Dans ce cas, il ne s'agit pas du secret de l'avocat mais de celui du client. Puis il ajoute:

> "Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered." (69)

3- Le juge a reçu mandat de la communauté de peser ces intérêts en conflit: le respect de la confidence et les intérêts supérieurs de la justice. Alors, si un juge décide qu'un journaliste doit répondre à une question, ce dernier ne peut invoquer aucun privilège pour refuser de le faire.

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(69) Ibid. p. 489.

4- Dans le présent cas, il y va de l'intérêt public que la source soit révélée.

De son côté, le juge Donovan - l'un des deux autres juges qui ont entendu l'appel - affirma que, même si le journaliste n'avait pas droit au secret, la personne qui l'interrogeait n'avait pas un droit absolu à l'information qu'elle requérait. La question devait être pertinente et devait en être une dont la réponse pouvait servir une fin utile en relation avec les procédures en cours. A son avis, un juge n'est pas lié "hand and foot" dès que, dans ce domaine, une question est techniquement admissible: il possède toujours un pouvoir discrétionnaire.

Un autre arrêt fut rendu la même année sur le sujet par Lord Parker (70). Comme dans le cas précédent, un journaliste avait refusé de dévoiler la source de son information. Le tribunal a alors statué que:

> " That, although certain classes of communication had been recognised as privileged, the law had not developed and crystallised the confidential relationship between the press and an informant into one of the classes of privilege known to the law; and that, although it was open to a court to say that the special circumstances in a particular case required the court to recognise a claim to immunity by a journalist on the grounds of public policy; there were no special circumstances in the present case since Clough's personal interests or those of his profession could not be preferred to the overriding public policy as evidenced by the setting up of the tribunal;"

Comme on peut le constater, le journaliste anglais n'est pas protégé, à ce titre, devant les tribunaux, même si le juge du procès peut, en vertu du pouvoir discrétionnaire qui lui est attribué, dispenser le journaliste de rendre témoignage au sujet de ses sources dans les circonstances que nous venons de décrire.

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(70) Attorney-General v. Clough, 1963 Q.B. 773.

c) La FRANCE

Ici, il y a une nette opposition entre la déontologie et le droit. En effet, toutes les associations ou syndicats de journalistes réclament l'immunité devant les tribunaux. Cependant, la loi ne leur reconnaît aucun privilège.

En effet, dans les rares cas où les tribunaux ont eu à se prononcer, ils ont toujours refusé d'admettre que les journalistes étaient tenus au secret professionnel, au même titre que les personnes mentionnées à l'article 378 du Code pénal (71). Cette disposition prévoit l'emprisonnement et l'amende pour certains dépositaires de secrets qui les révèlent sans que la loi les autorise ou les force à le faire.

Nous pouvons illustrer cette absence de privilège par un exemple récent. Le 20 mars 1972, le juge Alain Bernard, chargé d'une affaire de meurtre de R.P. Overney par un officier de la Régie Renault, convoquait à son cabinet M. Maurice Clavel, directeur de publication de l'agence de presse Libération. Celui-ci remit au juge, tel que requis, onze clichés pris par un des photographes de l'agence, le jour du meurtre. A sa sortie du bureau, M. Clavel déclara:

> "Avant de venir, j'ai consulté l'Union nationale des syndicats de journalistes. Les caches dissimulant certains visages existent sur les onze négatifs que j'ai donnés à M. Bernard. Un problème de morale journalistique se pose, car l'activité journalistique ne peut conduire à la pratique de la dénonciation..." (72)

Cette déclaration nous semble décrire valablement l'état du droit en France: la loi et la déontologie essaient d'y faire bon ménage.

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(71) BLIN, CHAVANNE et DRAGO. Traité du Droit de la Presse, Librairies Techniques, Paris, 1969, aux pages 542 et suivantes. Professional secrecy and the Journalist, I.P.I., Zurich, 1967, aux pages 65 et suivantes.

(72) Citation rapportée dans le journal Le Monde, 22 mars 1972.

d) Les ETATS-UNIS

Comme en Angleterre, le seul privilège reconnu par la common law des Etats-Unis est celui de l'aviseur légal. La protection accordée à certaines autres professions provient de l'existence de statuts de divers Etats (73). Il est cependant clair que, en common law, le journaliste ne jouit d'aucune protection, étant considéré comme un témoin ordinaire devant les tribunaux:

> "It is clearly the general rule at common law that information imparted to a journalist is not privileged against use in evidence and that newsmen are under testimonial compulsion to divulge material coming to their attention in confidence by virtue of their professional capacity." (74)

Cette doctrine est confirmée par la jurisprudence actuellement dominante aux Etats-Unis (75). Dans l'affaire Pappas, un journaliste avait été envoyé par son employeur, un poste de télévision, faire un reportage sur les Black Panthers. Ces derniers lui ont permis de pénétrer dans leurs quartiers à condition qu'il convienne de ne rien dévoiler de ce qu'il verrait et entendrait dans ces lieux. Il fut assigné à comparaître devant un "Grand Jury" qui enquêtait sur les Black Panthers. Il se présenta mais refusa de répondre à certaines questions pour les motifs suivants:

> (a) he claimed a privilege to protect the source of information acquired in confidence;
>
> (b) he had promised not to reveal what he saw or heard and a breach of his promise would make difficult to get information in the future, thus impairing his means of livelihood; and
>
> (c) to reveal it would be a violation of his rights under the First and Fifth Amendment to the Constitution of the United States.

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(73) Voir à ce sujet le Tableau produit en annexe à ce rapport (Schroeter).
(74) J.E. BEAVER. "The Newsman's Code, the Claim of privilege and Everyman's Right to Evidence", (1968) 47 Oregon L.R. 243, p. 246.
(75) In re Pappas, 266 N.E. 2d 297 (1971); Garland v. Torre, 250 F. 2d 545; In re Goodfader's Appeal, 367 P. 2d 472.

Le tribunal n'accepta point l'argumentation de Pappas, préférant s'en tenir à la règle selon laquelle tout citoyen doit témoigner lorsqu'il en est requis et ajoutant que le journaliste devait s'y soumettre.

On constate donc que, en common law, les tribunaux persistent dans leur refus de privilégier la presse à l'intérêt qu'a le public d'obtenir la preuve testimoniale la meilleure. Nous verrons, dans les pages qui suivent, que la jurisprudence évoluera peut-être très bientôt sur cette question. De plus, nous constaterons que certaines législations accordent présentement une protection au journaliste.

Nous terminons ici notre étude des juridictions qui ne reconnaissent pas le privilège du journaliste.

3- Les juridictions (76) qui reconnaissent le privilège du journaliste

Dans cette partie, nous vous présentons les différents moyens qui ont été retenus dans diverses sociétés pour assurer au journaliste une certaine protection dans ses relations avec l'appareil judiciaire. Nous les avons regroupés sous trois titres différents:

a) La protection gouvernementale

b) La protection judiciaire

c) La protection légale

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(76) Nous donnons ici au terme "juridiction" un sens très large de façon à couvrir également certains modes de protection qui n'ont qu'une valeur para-juridique.

a) La protection gouvernementale

Elle se présente sous la forme de directives gouvernementales à l'intention des officiers de l'Etat qui veulent assigner des journalistes à comparaître.

Cette formule se retrouve aux Etats-Unis, à l'échelon fédéral, par suite d'abus qu'auraient commis certaines agences gouvernementales qui, au cours des dernières années, désiraient utiliser les journalistes comme témoins à charge lors de certaines enquêtes. Le 10 août 1970, le procureur général des Etats-Unis, M. Mitchell, rappelait aux délégués du Barreau américain les directives formelles qu'il avait adressées à ses officiers, à ce sujet. Vu leur importance et leur précision, nous croyons utile de les reproduire:

> "A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a springboard for investigations.
>
> B. There should be sufficient reason to believe that the information sought is essential to a successful investigation-particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.
>
> C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.
>
> D. Authorization requests for subpoena should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.
>
> E. Great caution should be observed in requesting subpoena authorization by the Attorney-General for unpublished information or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.
>
> F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

> G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.
>
> ... It must always be remembered that emergencies and other unusual situations may develop where a subpoena may be submitted which does not exactly conform to these guidelines."

Ces textes nous amènent à formuler les commentaires suivants:

1- Ces règles s'appliquent à tout type d'informations recueillies par la presse.

2- Elles ne créent aucun privilège en faveur du journaliste puisque chaque situation doit être examinée au mérite.

3- Elles constituent tout au plus un certain code d'éthique gouvernemental.

4- Elles peuvent être écartées, de façon purement discrétionnaire, par l'Etat.

En 1969, la Fédération professionnelle des journalistes du Québec avait demandé au premier ministre, M. J.J. Bertrand, et au ministre de la Justice, M. R. Paul, "de faire en sorte qu'aucun journaliste ne soit convoqué, en tant que tel, comme témoin devant le tribunal chargé de disposer des accusations portées à la suite des incidents de Saint-Léonard" (77). M. Paul avait alors répondu que cette protection gouvernementale ne pouvait être accordée puisque les poursuites avaient été intentées par la municipalité de Saint-Léonard et non par les procureurs de la Couronne (78).

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(77) Citation parue dans Le Devoir, 29 septembre 1969.
(78) Voir Le Devoir, 31 octobre 1969.

b) La protection judiciaire

Ce type de protection se manifeste par une entente - tacite ou expresse - entre le juge et le journaliste, en vertu de laquelle ce dernier exerce de façon informelle son privilège. Nous tenterons d'illustrer cette situation par les exemples suivants:

- La BELGIQUE

En Belgique, le journaliste ne bénéficie d'aucune protection statutaire. Il s'ensuit que, légalement, il doit témoigner devant les tribunaux, s'il en est requis. Cette règle a été confirmée par deux arrêts, l'un de 1870 (79) et l'autre de 1957 (80).

Toutefois, il existe dans ce pays une longue tradition selon laquelle les journalistes appelés à témoigner en vue de révéler des informations obtenues confidentiellement refusent de le faire. Ils invoquent alors que leur conscience professionnelle leur impose l'obligation morale de garder le silence.

D'autre part, les magistrats belges semblent s'abstenir systématiquement d'exiger du journaliste qu'il révèle telles informations confidentielles.

L'on ne peut toutefois affirmer qu'il existe une jurisprudence formelle favorable au journaliste: il y a simplement absence de jurisprudence.

Les deux arrêts que nous avons cités précédemment - les seuls que nous avons pu retracer au cours du dernier siècle - confirment l'existence de cette entente entre la magistrature et les journalistes.

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(79) "Les journalistes ne peuvent invoquer le secret professionnel", Cass. b., 25 avril 1870, P., 1870, I, 226.

(80) "Le journaliste et le directeur d'un journal ne sont pas investis de fonctions qui permettent de les considérer comme étant par profession ou par état dépositaires des secrets d'autrui", Cour Sup. Grand-Duché de Luxembourg, 21 mars 1957, J.T. 1957, 516.

- Le QUEBEC

Nous avons déjà vu que, dans notre province, des juges ont accepté que des journalistes soient dispensés de rendre témoignage (81) ou de révéler leurs sources (82). Nous sommes toutefois en présence de décisions qui ne reflètent nullement l'attitude générale de nos tribunaux sur cette question.

c) La protection légale

Nous avons déjà mentionné à la page 16, que l'Allemagne de l'Ouest, l'Autriche, la Norvège, les Philippines et la Suède accordent au journaliste une certaine forme de protection légale. Cependant, tel que convenu, nous nous limitons à un exposé exhaustif de la législation américaine sur le sujet. D'ailleurs, nous sommes portés à croire que le contexte juridique et social du Québec et du Canada s'identifie beaucoup mieux à celui des Etats-Unis qu'à celui des pays que nous avons cités précédemment.

Actuellement, dix-sept Etats américains protègent le journaliste, par voie législative. De plus, le 23 mars 1971, le Sénat des Etats-Unis était saisi d'un projet de loi - Bill S. 1311 - intitulé "Newsmen's Privilege Act" qui, après sa seconde lecture, a été référé à un Comité du Sénat; ce projet n'a pas encore été adopté.

D'autre part, après avoir constamment considéré le journaliste comme un témoin contraignable au même titre que les témoins ordinaires, les tribunaux américains semblent, depuis 1970, se diriger vers une interprétation qui lui octroierait le privilège de se

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(81) Juge L. Laperrière, lors de l'Enquête de la Commission de Police sur la conduite des policiers de Montréal le 7 octobre 1969.

(82) Juge P. Miquelon, le 4 décembre 1969, lors du procès de Pierre Vallières pour le meutre de Mlle Thérèse Morin.

taire lorsqu'il est assigné à ce titre. Cette nouvelle jurisprudence s'appuie sur le Premier Amendement de la Constitution américaine qui garantit le droit du public à l'information.

Dans une première partie, nous analyserons les différents textes législatifs qui accordent une protection spécifique au journaliste. Nous verrons ensuite l'interprétation judiciaire de la common law antérieure à 1970 et celle qui pourrait éventuellement la remplacer.

A- La protection statutaire

Les textes adoptés par les dix-sept Etats qui accordent une protection au journaliste n'ont pas tous la même portée. Pour en faciliter la compréhension, nous avons préparé un tableau qui décrit, de façon schématique, les différents types de privilèges ainsi que leurs modalités (83). Nous vous présentons ici une synthèse de nos constatations.

1) Objet et étendue de la protection

Tous les textes, y compris le Bill S. 1311, protègent les sources d'information.

Par contre, dans les Etats de Michigan et de New-York, le journaliste peut également taire l'information confidentielle elle-même. Ainsi, le législateur du Michigan a édicté que:

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(83) Voir l'Annexe II à la fin de ce rapport.

"In any inquiry authorized by this act communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential" (84). Dans l'Etat de New-York, l'on y précise que le journaliste ne peut être condamné pour outrage au tribunal... "for refusing or failing to disclose any news or the source of any such news coming into his possession..." (85).

De plus, le projet de loi fédéral, à l'article 2, accorde clairement au journaliste le privilège de ne pas dévoiler une information confidentielle, à moins que ne s'applique l'une des exceptions prévues à l'article 4 de ce Bill.

D'autre part, les tribunaux de l'Etat de Pennsylvanie ont statué que l'expression "source of information" utilisée dans le Statut de l'Etat couvrait également l'information obtenue. Selon eux, il faut donner une interprétation souple et large du texte à ce sujet (86).

Cependant, cette protection statutaire n'est pas sans limite dans tous les textes législatifs. En effet, l'on retrouve des restrictions dans les statuts de six Etats (87) ainsi que dans le projet de loi fédéral.

Vu l'importance des réserves édictées, il nous semble essentiel de les expliciter:

a) Les Etats de Californie et de New-York n'accordent qu'une seule protection: la garantie que le journaliste ne peut être poursuivi pour outrage au tribunal s'il refuse de dévoiler une information confidentielle. Ils n'accordent pas de privilège au journaliste.

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(84) Art. 767.5a du Code of Criminal Procedure.
(85) N.Y. Cons. L. Ann. s 79h. (1971).
(86) Voir In re Taylor 412 Pa. 32, 193A. 2d 181 (1963).
(87) Etats de Alaska, de Arkansas, de Californie, de Louisiane, de New Mexico et de New York.

Ainsi, ces textes législatifs n'excluent pas l'hypothèse d'autres recours, notamment devant des juridictions civiles.

b) Les Etats de Alaska, de Louisiane et de New Mexico, tout en accordant le privilège, laissent au tribunal le pouvoir de l'écarter dans certaines circonstances.

Ainsi, en Alaska, si un journaliste invoque le privilège, toute personne qui a droit de l'interroger, ou le juge de son propre chef, peut contester sa demande. Le privilège peut être supprimé par le tribunal devant qui le journaliste l'invoque s'il en vient à la conclusion, après enquête, que "the witholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest".

En Louisiane, lorsque le journaliste demande de se prévaloir de son privilège, les personnes ou parties qui désirent obtenir l'information doivent en faire la demande et établir, par écrit, les raisons pour lesquelles ce témoignage est "essential to the protection of the public interest". Le tribunal décide, après enquête.

Dans l'Etat de New Mexico, le texte de loi accorde le privilège "unless disclosure be essential to prevent injustice". Contrairement à la législation des deux Etats sus-mentionnés, le privilège est purement conditionnel. Si le journaliste l'invoque, le juge doit, dans chaque cas, se prononcer sur son octroi. Sa décision doit tenir compte notamment de la nature du litige, de la pertinence de la source et de la possibilité d'obtenir autrement l'information désirée.

c) En Arkansas, pour qu'un journaliste soit tenu de dévoiler la source de son information, l'on doit prouver que l'article en cause a été écrit, publié ou diffusé "in bad faith, with malice, and not in the interest of the public welfare". L'on constate donc que, dans cet Etat, le fardeau de la preuve repose clairement sur la personne qui veut obtenir l'information confidentielle, selon des modalités qui accordent une protection très grande au journaliste.

d) Enfin, le projet fédéral prévoit également des réserves à ce sujet. D'une part, l'information confidentielle n'est pas protégée, lorsque celle-ci a été publiée, diffusée ou autrement rendue publique par la personne qui invoque le privilège.

D'autre part, la protection n'est pas accordée:

"(1) to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information; or

(2) to the source of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the United States."

Dans ce projet fédéral, lorsqu'une personne demande à bénéficier du privilège, la partie qui désire connaître l'information doit recourir à une Cour de district fédérale. Le juge ordonnera au journaliste de témoigner s'il existe "substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage, or foreign aggression".

Comme on peut le constater, le législateur dans tous les cas, demande aux tribunaux de trancher le litige, lorsqu'il accorde au journaliste une protection assortie de restrictions.

2) Personnes protégées

Dans certains Etats, seul le "reporter" bénéficie du privilège (88). D'autres législateurs protègent de façon générale les collaborateurs des media d'information, en utilisant une formule du type "any person engaged in, employed, connected with..." (89).

Enfin, certaines lois accordent le privilège à des personnes déterminées dont elles précisent la fonction:

- Etat de Arkansas : "Editor, reporter or other writer or publisher or manager or owner".
- Etat de Nevada : "Reporter or editorial employee of any..."
- Bill S. 1311 : "Reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in the gathering or presentation of news for any..."

3) Media d'information impliqués

La plupart des textes de lois couvrent tant la presse parlée que la presse écrite. Seuls les Etats de Michigan et de New-Jersey n'accordent le privilège qu'à la presse écrite.

A la lecture du tableau en annexe, l'on constate que certaines législatures ont tenté d'être les plus exhaustives possible en procédant à une énumération des types de publications

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(88) Les Etats de Alaska, Louisiana, Michigan et New Mexico.
(89) Les Etats de Alabama, Arizona, California, Indiana, Kentucky, Maryland, Montana, New-Jersey, New-York, Ohio et Pennsylvania.

protégées ou en tentant de limiter le privilège à des media d'information ayant une diffusion relativement importante dans le milieu. L'étude de ces critères quantitatifs ou qualitatifs ne nous semble pas essentielle dans la présente étude.

4) Forum de la protection

Deux Etats sont silencieux quant aux instances devant lesquelles la protection est reconnue ou peut être accordée (90). L'Etat de Michigan restreint la portée de cette protection aux enquêtes criminelles autorisées par la loi.

Dans les statuts de tous les autres Etats ainsi que dans le projet de loi fédéral, l'on couvre généralement les tribunaux, les organismes d'enquête, les organismes administratifs et la législature. En résumé, on peut affirmer que les journalistes peuvent invoquer le privilège devant toutes les instances détenant le pouvoir de les assigner à comparaître et d'exiger qu'ils témoignent sur des faits dont ils ont eu connaissance.

B- La protection constitutionnelle

Jusqu'à récemment, les tribunaux américains ont constamment refusé de reconnaître au journaliste tout privilège, sauf lorsqu'une protection lui était statutairement accordée. En l'absence de textes précis octroyant ce privilège, l'on appliquait la "common law" selon laquelle le journaliste pouvait être contraint de témoigner comme tout témoin ordinaire.

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(90) Les Etats de Alaska et de New-Jersey.

En 1958, l'actrice Judy Garland poursuivit une journaliste, Marie Torre, en libelle pour un article qu'elle avait écrit. Lors de l'audition, l'on demanda à Mlle Torre de révéler le nom de la personne qui lui avait fourni les informations sur lesquelles elle avait appuyé son article. Elle refusa de dévoiler la source de son information en invoquant le Premier Amendement de la Constitution. Elle fut condamnée pour outrage au tribunal (91), tant en première instance qu'en appel. C'était la première fois qu'un journaliste justifiait son refus de témoigner par cette disposition constitutionnelle qui se lit comme suit:

> "First Amendment:
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Mlle Torre prétendit que, en l'obligeant à témoigner, l'on irait à l'encontre de ce texte qui garantit la liberté de la presse, puisque "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish protanto the flow of news to the public".

La Cour d'Appel statua que le Premier Amendement de la Constitution Fédérale garantissant la liberté de la presse ne conférait aucun droit à un journaliste de refuser de répondre à une question concernant l'identité d'une personne.

Par la suite, d'autres journalistes tentèrent sans succès de faire prévaloir une interprétation de ce texte qui leur fût favorable. Jusqu'en 1970, les tribunaux refusèrent systématiquement leur point de vue, tant les Cours d'Appel (92) que

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(91) Garland v. Torre, 259 F 2d 545 et 358 U.S. 910 (1958).
(92) Voir l'arrêt In re Alan L. Goodfader 367 P. 2d 472 (1962) dont la Cour a fait un excellent syllabus.

la Cour Suprême des Etats-Unis (93).

L'on reconnut pour la première fois la protection constitutionnelle du privilège du journaliste en 1970 dans l'arrêt Caldwell. Le journaliste Earl Caldwell, qui s'était spécialisé dans des reportages sur le "Black Panther Party", réclama le privilège en refusant de comparaître et de témoigner au sujet du Parti par suite d'un subpoena émis par un "federal grand jury". Il invoqua comme argument que, s'il témoignait, il perdrait la confiance de ceux qui lui fournissent l'information, ce qui aurait un effet certain sur la transmission de nouvelles au public.

La Cour de district fédérale lui accorda une protection mitigée en lui permettant de ne pas dévoiler ses sources ou l'information obtenue; le juge affirmait cependant qu'il était prêt à modifier son ordonnance si le gouvernement faisait la preuve "of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means" (94).

N'étant pas satisfait de cette protection partielle, Caldwell en appela, demandant d'être exempté, non seulement de témoigner, mais aussi de comparaître. La Cour d'Appel lui donna raison (95). Elle reconnut qu'il était difficile et délicat de réconcilier le Premier Amendement, qui garantit la liberté de la presse, avec la bonne administration de la justice selon laquelle les personnes assignées ont le devoir de comparaître et de témoigner en vue de faire connaître la vérité.

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(93) Murphy v. State of Colorado, 365 US 843 (1961); Buchanan v. State of Oregon, 392 US 2055 (1968) confirmant la décision de la Supreme Court of Oregon, 463 P. 2d 729 (1968).

(94) Application of Earl Caldwell, 311 Fed. Supp. 358.

(95) Caldwell v. United States of America, 434 F. 2d 1081 (9th Cir. 1970).

Toutefois, les juges d'appel durent admettre que, si Caldwell témoignait, il perdrait alors la confiance des Black Panthers et des autres "sensitive sources" du genre: ils ne lui parleraient plus et les media d'information ne seraient plus en mesure de couvrir les activités des militants noirs. Puis ils ajoutèrent que le concept de presse libre exigeait que l'on accorde aux media d'information une mesure d'autonomie, qu'ils devaient pouvoir faire leurs enquêtes sans crainte d'une interférence gouvernementale et qu'ils devaient pouvoir protéger leurs méthodes d'investigation.

Après une longue analyse, ils en vinrent à la conclusion que, dans le cas qui leur était soumis, le droit du public à l'information devait primer sur le devoir d'un témoin de rendre témoignage. En face d'une alternative, ils optaient pour la première solution, tout en insistant sur le particularisme du litige dont ils étaient saisis.

La Cour Suprême des Etats-Unis n'a pas encore pris position dans cette affaire.

D'autre part, il est utile de préciser que les décisions rendues dans l'affaire Caldwell n'ont pas semblé convaincre les juges qui ont statué depuis sur des demandes semblables. Dans certains cas, ils ont clairement refusé d'accorder la protection constitutionnelle (96); dans d'autres cas, après avoir évalué le poids des principes en cause, ils ont opté pour une solution favorable à l'administration de la justice (97). Enfin, les juges de la Cour Suprême du Wisconsin ont théoriquement reconnu la protection constitutionnelle pour le privilège du journaliste, mais ont jugé que l'information que détenait le journaliste pouvait

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(96) In re Pappas, 266 N.E. 2d 297 (1971). Décision de la Supreme Court of Massachusetts.

(97) Branzburg v. Meigs, No W-29-71 (Ky' 71).

conduire à l'arrestation et à la condamnation de personnes ayant commis un acte criminel grave; et que, vu les circonstances, il était préférable pour l'épanouissement de toutes les libertés fondamentales, que celui-ci rende témoignage (98).

Cette question n'est donc pas encore réglée. D'ailleurs, l'abondante littérature sur le sujet que vous trouverez dans la bibliographie que nous soumettons en annexe, en est une preuve éclatante.

En conclusion, cette étude laisse voir clairement qu'il n'existe actuellement pas d'unanimité concernant la nécessité d'accorder un privilège aux journalistes appelés à témoigner devant les tribunaux. Il semble que d'ici quelques années ce privilège sera reconnu de façon générale aux Etats-Unis. Par contre, dans les autres pays, il semble que l'évolution sera beaucoup plus lente à moins d'un revirement majeur difficilement prévisible.

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(98) State of Wisconsin v. Knops, 183 N.W. 2d 93 (1971).

PARTIE II - LA NATURE ET LES CONDITIONS D'EXERCICE DU PRIVILEGE QUANT AU JOURNALISTE

Le dilemme que rencontrent les législateurs et les tribunaux, lorsqu'il s'agit d'accorder une protection au journaliste, provient de la nature même du privilège invoqué. L'aviseur légal ou religieux ainsi que le médecin en bénéficient dans le seul but d'éviter la dissémination d'informations confidentielles relatives à la vie ou au bien-être de leur confident. Pour le journaliste, c'est différent puisque, normalement, celui-ci cherche à assurer une publicité aux faits qui lui sont révélés mais à taire les sources de son information. Ainsi, dans le cas du journaliste, la source désire que l'information soit rendue publique alors que, pour les autres professions, celle-ci exige le contraire.

Nous devons alors nous demander si l'on peut considérer le journaliste de la même façon que le professionnel dit de service. Il est vrai que contrairement à la personne qui se confie à un professionnel dont elle a besoin - avocat, médecin, etc. -, l'informateur qui se départit d'une nouvelle n'est pas tenu de le faire. Il n'y a aucune nécessité pour lui, en tant qu'individu, de faire une confidence à un journaliste.

D'autre part, nous devons nous demander si les citoyens se sentent personnellement lésés lorsqu'un journaliste est tenu de dévoiler ses sources devant les tribunaux. Seule une enquête sérieuse permettrait de bien saisir l'opinion de la population à ce sujet.

Par contre, l'on peut présumer que la reconnaissance du secret pour certaines professions est suffisamment ancrée dans les moeurs pour que l'on puisse en inférer que toute violation non justifiée aurait un impact majeur sur les relations interpersonnelles au sein de la population.

Il faut donc placer le privilège du journaliste à un niveau plus

global. En effet, le public peut souffrir de l'inexistence de cette protection, si cet état de fait constitue une entrave à son droit fondamental à l'information, résultat de la liberté de la presse.

Toute réflexion sur la possibilité d'établir, pour le journaliste, un privilège de ne pas dévoiler ses sources devant les tribunaux ou devant d'autres organismes, ne peut donc faire abstraction de cette notion d'intérêt public. Si l'on admet que la société a le droit d'être le mieux renseignée possible, il est alors d'importance capitale qu'elle puisse bénéficier de la libre dissémination de l'information; ce que les auteurs américains appellent "a free flow of news".

Or les media d'information constituent la source principale d'approvisionnement du public en cette matière. Si cette source vient à se tarir parce que la société impose aux journalistes l'obligation d'identifier les personnes qui les informent, il peut y avoir danger que le public lui-même soit moins bien protégé. A titre d'exemples, pensons à des situations telles que les cas de corruption, de complots, d'inefficacité d'organismes publics, etc.

Un journaliste québécois illustrait ainsi sa pensée:

> "L'intérêt public exige que les communications qui ont lieu entre un avocat et son client, par exemple, demeurent confidentielles (...) il est aussi de l'intérêt de la population de savoir certaines choses; ainsi, dit-on, la population doit connaître les motifs des attentats terroristes (...) un système de corruption dans une municipalité, une faillite frauduleuse, etc. Ne sont-ce pas là des choses que la population a droit de savoir ?"(99)

D'autres arguments subsidiaires peuvent militer en faveur de l'opportunité de créer un tel privilège. Dans l'affaire Caldwell, que nous avons étudiée précédemment, le tribunal a manifesté la crainte que, sans une certaine protection, le journaliste pourrait devenir un agent ou informateur du gouvernement ou de la force policière. Il s'ensuivrait alors que si le journaliste était perçu comme tel par ses informateurs, on risquerait de

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(99) Le Devoir, 22 mars 1969.

voir s'assécher graduellement le contenu de la presse. Cette question fut soulevée à quelques reprises devant le Comité Spécial du Sénat canadien sur les moyens de communication de masse (Commission Davey). Ainsi, lors des délibérations du Comité, le 17 décembre 1969, M. David Waters affirmait que:

> "Crown prosecutors in the Montreal area increasingly are requiring that news reporters and photographs testify and produce whatever documentary evidence they have gathered in connection with particular events. The adoption of this tactic as a regular practice poses almost as serious a threat to the freedom of the press as does direct censorship. If they are forced to turn prosecution witnesses through the use of the subpoena and the threat of a contempt of court citation on a regular basis, they will come to be regarded as little more than police spies and will be treated as such by demonstrators."

De plus, on peut affirmer que la liberté de la presse exige que l'on reconnaisse aux media une autonomie substantielle sans laquelle pourrait s'instaurer, chez eux, un climat d'auto-censure:

> "Further, it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship." (100)

A maintes reprises, l'on a soumis des arguments favorables à la reconnaissance d'un tel privilège. Certains avaient pour objet de garantir au journaliste une protection personnelle alors que d'autres s'appuyaient sur la notion d'intérêt public et du droit du public à l'information. Les propos tenus par les procureurs des intimés, dans l'arrêt Attorney-General v. Mulholland et Attorney-General v. Foster (101) nous semblent constituer une excellente synthèse de l'opinion favorable à cette dernière thèse.

Nous sommes portés à croire que la nature du privilège a été

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(100) Caldwell v. United States of America, 434 F. 2d 1081 (1970), à la page 1086.

(101) Voir page 21ss.

bien définie par M. Rod Blaker:

> "I think it is the opinion of the membership of the Association at large, that since we operate partly in the function of public interest, anything which might assist the journalist in delivering to the public as much information as possible, should be considered as an added advantage not to the journalist but to the public. As you pointed out with the medical profession, perhaps a similar thing had not been placed in the body of the law nor has it been with the lawyers with the privileges imbedded in the law. The thinking I believe amongst journalists is that if this privilege were extended to them they would be better able to serve not their interest but the interest of the public." (103)

D'autre part, il ne faut pas perdre de vue que la reconnaissance d'un privilège, en faveur du journaliste, s'oppose à une règle fondamentale selon laquelle tout citoyen doit témoigner en justice, lorsqu'il en est requis. En effet, toute exception à cette obligation réduit l'information soumise au tribunal et risque alors de le forcer à prononcer un jugement même s'il n'a eu qu'une connaissance partielle des faits.

Nous sommes donc en présence de deux principes fondamentaux qui se réclament tous deux de la défense de l'intérêt public. La nature du privilège du journaliste et la nature de l'obligation de témoigner, qui s'appuient sur cette même notion, s'opposent constamment et la primauté de l'un sur l'autre doit, en conséquence, être déterminée par chaque société. Cette décision, à notre avis de nature politique et non juridique, doit être prise par ceux qui ont reçu mandat d'administrer cette société. C'est ainsi que l'on peut s'expliquer que certaines législations reconnaissent le privilège alors que d'autres s'opposent à ce que le journaliste puisse bénéficier d'un statut spécial. Tout dépend, à notre avis, de la hiérarchie que les citoyens d'un Etat ont déterminée entre les valeurs auxquelles ils croient.

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(102) Comité Spécial du Sénat sur les Moyens de communication de masse, 17 février 1970, 6: 51.

D'autre part, il faut souligner que les journalistes n'ont encore pu faire l'unanimité sur ce sujet (103). Lors de sa comparution devant la Commission Davey, le sénateur Grattan O'Leary déclarait:

> "Il est une autre revendication que je rejette totalement et c'est qu'un journaliste a le droit de protéger ses sources d'information. Il peut actuellement porter injure au caractère d'un individu, être l'objet de poursuites et être traduit devant le tribunal pour diffamation et lorsque le procureur lui demande "Où avez-vous obtenu les renseignements sur lesquels vous basez vos déclarations?", il n'a qu'à répondre: "Il me faut protéger mes sources de renseignements". C'est là un non-sens, mes amis, et un non-sens qui comporte des dangers. Le journaliste dit qu'il a les mêmes droits qu'un prêtre dans le confessional ou qu'un médecin à l'égard de ses patients et je soutiens que c'est parfaitement ridicule. Le prêtre ne sort pas du confessional pour mettre en accusation celui qui vient de se confesser et le médecin ne dit pas au grand public de quelle façon un de ses patients a contracté la syphilis; ainsi, lorsque vous placez un tel droit entre les mains d'un individu, que vous lui accordez le pouvoir de détruire le caractère d'un individu, de détruire sa réputation et lui faire perdre son rang dans la société, vous placez ainsi des pouvoirs terriblement dangereux entre les mains d'un journaliste. Et qu'arrive-t-il s'il n'a pas de sources de renseignements ? Lord Northcliffe a posé cette question en Angleterre il n'y a pas très longtemps. Qu'arrive-t-il si le journaliste n'a vraiment pas de source de renseignements? Il peut quand même dire "je me dois de protéger ma source de renseignements" mais il détruit quand même, ce faisant, le caractère d'un individu.
>
> Voilà les choses auxquelles je me suis opposé tout au cours de ma vie. Dieu sait que je crois en la liberté de la presse et dans la liberté tout court, mais dans une liberté qui est conditionnée par les besoins de la société.
>
> La tâche constante de tous les gouvernements a été de redéfinir les droits. Les gouvernements y ont procédé par des mesures et des lois et lorsqu'on s'élève contre la censure, toutes les lois inscrites dans les statuts deviennent une censure contre quelqu'un ou quelque chose. Pourquoi tous ces mots qui nous font peur? Perte de liberté, manque

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(103) Voir H.L. NELSON. "The Newsman's Privilege Against Disclosure of Confidential Sources and Information",24Vanderbilt L.R. (1971) 667, à la page 677.

de liberté, censure? On a toujours eu besoin de censure dans une société civilisée et elle sera toujours nécessaire." (104)

Nous en arrivons maintenant à l'étude des conditions d'exercice du privilège, lorsqu'une personne est autorisée, en vertu de sa profession, à taire des informations confidentielles.

En droit québécois, l'article 308 C.P. exige que la révélation au professionnel ait été faite confidentiellement en raison de son état ou profession. La loi et la jurisprudence du Québec établissent que:

- Le professionnel doit être dans l'exercice de ses fonctions.
- L'appréciation de la confidentialité est laissée à la discrétion des tribunaux.
- Le professionnel est défini par sa loi corporative.

Dans les provinces de common law du Canada et aux Etats-Unis, quatre conditions sont requises pour que soit reconnu le privilège. Elles sont énoncées par Wigmore:

"1. The communications must originate in a confidence that they will not be disclosed;

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

3. The relation must be one which in the opinion of the community ought to be sedulosly fostered; and

4. the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation". (105)

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(104) Comité Spécial du Sénat, 17 février 1970, 20: 65.
(105) 8 J. WIGMORE. Evidence 3rd ed. $\frac{s}{s}$ 2285.

A la lumière de ce qui précède, nous tenterons de préciser à quelles conditions une communication peut être déclarée privilégiée, selon notre système juridique. Dans le cadre de notre analyse, nous établierons un parallèle avec la profession de journaliste.

Trois éléments fondamentaux retiendront notre attention:

1- La personne doit être un professionnel.

2- Le professionnel doit être dans l'exercice de ses fonctions.

3- Il faut qu'il y ait une révélation confidentielle.

A- UN PROFESSIONNEL

Comme nous l'avons déjà mentionné, la définition de chacune des professions de service se retrouve, par voie d'interprétation des textes, dans les statuts relatifs aux corporations professionnelles. De plus, l'on doit ajouter que le critère de professionnalité est contrôlé par la corporation elle-même.

La définition de la profession de journaliste est présentement fort imprécise. Souvent, elle couvre des réalités différentes selon les organismes qui s'y intéressent. A titre d'exemples, nous en citerons trois:

> "Définition du journaliste
>
> Pour les fins qui sont décrites dans ses statuts et règlements, et pour ces fins uniquement, la F.P.J.Q. reconnaît comme journaliste celui qui a pour occupation principale, régulière et rétribuée l'exercice de l'une ou de plusieurs fonctions suivantes, pour le compte d'entreprises de presse, de réseaux ou de postes de radio et de télévision établis au Québec ou dont la clientèle est majoritairement québécoise, ou pour le compte des services

gouvernementaux d'information du Québec dotés d'un statut d'indépendance:

> Recherche de l'information
> Reportage
> Rédaction de compte-rendus
> Interview
> Rédaction de chronique spécialisée
> Traduction et adaptation de textes d'information
> Photographie de presse
> Reportage filmé ou électronique
> Secrétariat de rédaction (assignation du personnel, vérification des textes, titrage et mise en pages) ou l'équivalent dans la presse parlée
> Préparation d'analyses et de commentaires sur l'actualité
> Dessin de caricatures sur l'actualité
> Animation, réalisation ou supervision d'émissions ou de films sur l'actualité
> Direction des services d'information, d'affaires publiques ou de services assimilables. (106)

- "JOURNALISTE désigne toute personne ayant pour occupation principale, régulière et rétribuée, l'accomplissement d'actes journalistiques;

  ACTE JOURNALISTIQUE désigne tout acte posé en vue de la recherche et de la diffusion d'information." (107)

- "Any person connected with a weekly, semiweekly, triweekly, or daily newspaper that conforms to postal regulations, which shall have been published for five (5) consecutive years in the same city or town and which has a paid circulation of two per cent (2%) of the population of the county in which it is published;" (108)

On peut donc constater que la définition du journaliste varie selon les objectifs que se sont fixés les organismes en cause. Ainsi, la Fédération des journalistes tient à ce que sa définition ne serve que pour les fins décrites dans ses statuts et règlements. D'autre part, probablement

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(106) Règlements de la Fédération Professionnelle des Journalistes du Québec, a. 1.01.
(107) Constitution du Conseil de Presse du Québec, a. 1.5 et 1.4.
(108) Indiana Ann. Stat. $\frac{s}{s}$ 2-1733 (1968).

en vue d'éviter toute querelle, le Conseil de presse a employé des termes vagues susceptibles d'être interprétés de multiples manières. Enfin, le législateur de l'Etat d'Indiana a tenu à donner un sens très restreint au terme "journaliste" afin d'éviter que quiconque se prévale de ce titre pour réclamer une protection devant les tribunaux.

Donc, si l'on accepte - ce qui nous semble normal - que la personne qui réclame un privilège agisse à titre professionnel et si l'on admet que, au Québec, personne n'a encore cherché à définir juridiquement ce qu'est un journaliste, l'on doit alors s'interroger sérieusement sur ce que devraient être les éléments constitutifs de cette définition. Par exemple, nous soulevons les questions suivantes:

1- Cette définition doit-elle couvrir toutes les personnes reliées à l'information ?

Le journaliste peut oeuvrer dans les domaines de la radio, de la télévision, de la presse écrite. Il peut également y collaborer à plusieurs titres: reporter, "editor", directeur, etc.

2- Cette définition doit-elle englober tous les types de publications ?

On peut penser aux journaux "underground" ou aux journaux étudiants. Ainsi, le rédacteur d'un journal, dans une maison d'enseignement, agit-il professionnellement ?

D'autre part, celui qui rédige des pamphlets politiques ou publicitaires peut-il être considéré juridiquement comme un journaliste professionnel ? En est-il ainsi du responsable de la publication du journal mensuel d'un syndicat ou d'une corporation professionnelle ?

3- Le journaliste doit-il être à l'emploi - à temps plein ou partiel - d'un des media d'information ? La réponse à cette question est capitale pour le journaliste à la pige et pour celui qui occupe également une autre occupation.

4- Si l'on croit que le privilège doit être reconnu en vertu du principe de la liberté de la presse, peut-on en conclure que toute personne qui diffuse une information remplit alors une fonction journalistique qui devrait être couverte par cette définition ? (109). Cette difficulté est susceptible de survenir si, comme aux Etats-Unis, l'on accorde une protection de type constitutionnelle au journaliste ou à la personne qui découvre une nouvelle d'intérêt public.

5- Enfin, le journaliste doit-il être membre d'une association ou d'une corporation professionnelle reconnue pour qu'il puisse protéger ses sources devant les tribunaux ?

Présentement, sauf dans certains cas exceptionnels que nous avons soulignés précédemment, seuls les membres de certaines professions jouissant d'un statut corporatif peuvent réclamer une protection devant les tribunaux.

Si le législateur québécois - ou canadien - jugeait à propos d'inclure le journaliste dans la catégorie des professions protégées, il lui faudrait préalablement prendre certaines options. S'il omettait de le faire, ce rôle serait alors transféré aux tribunaux qui verraient, à la lumière de chaque cas, à définir le statut juridique du journaliste.

Quelles que soient les décisions du législateur à ce sujet, nous sommes persuadés qu'elles sont foncièrement de nature politique. Sur ce plan, le droit a pour seule fonction de permettre qu'une décision de nature non juridique puisse être susceptible d'une sanction légale.

B- UN PROFESSIONNEL DANS L'EXERCICE DE SES FONCTIONS

Notre droit protège une confidence faite au professionnel en raison de son état ou de sa profession (110). On pourrait, en conséquence,

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(109) Voir BEAVER. "The Newsman's Code", 47 Oregon L.R. 243 (1968) p. 250.
(110) A. 308 C.P.

croire que tout ce qu'un confident révèle à une personne qui exerce une profession privilégiée est une communication privilégiée (111). Tel n'est pas nécessairement le cas, tant en droit civil qu'en droit pénal. Aussi nous semble-t-il nécessaire d'apporter des précisions sur ce point.

1- LES RELATIONS DE NATURE PROFESSIONNELLE ENTRE LES PARTIES

Il faut, premièrement, qu'il existe un lien ou des relations professionnelles entre les parties. Ainsi, la révélation faite à un médecin ou à un avocat ne saurait être protégée que si, en fournissant l'information, le confident a voulu retenir les services du professionnel. Cette relation doit, de plus, être le produit de la volonté conjointe du confident et du professionnel (112).

En second lieu, le privilège ne peut s'appliquer aux communications reçues par le professionnel de sources autres que son client ou patient, sauf si le tiers est son mandataire (113). Cette règle s'applique même si le confident révèle ultérieurement le même fait au professionnel (114).

Enfin, l'obligation de garder le secret ne s'éteint pas dès que la relation entre le professionnel et le confident se termine (115).

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(111) Voir Magnan v. Hamel, 1944 B.R. 514.
(112) Voir Minter v. Priest, (1930) A.C. 558.
(113) Voir A. & D. Logging Co. v. Convair Logging Ltd., (1967) 63 D.L.R. 2d 618.
(114) J.L. BAUDOUIN. "Le secret professionnel du conseiller juridique", (1963) 65 R. du N. 483, à la page 498.
(115) Voir Barwick & Sons Ltd. v. Farmers Merchants Trust Co., 1968 R.P. 59 et Bell v. Smith, (1968) 68 D.L.R. 2d 751.

L'application de cette jurisprudence au journaliste soulève donc des difficultés. En effet, la nature professionnelle de la relation entre le journaliste et son informateur n'apparaît pas toujours clairement. De plus, la source peut, dans certains cas, être purement documentaire: par exemple, lorsque le journaliste prend connaissance d'un texte à l'insu de son auteur ou de celui qui en a la garde.

A notre avis, on ne peut édicter de règles précises à ce sujet. Cela implique que, si le privilège est accordé au journaliste, les tribunaux seront appelés à se prononcer sur cette question.

2- LES LIMITES DU MANDAT PROFESSIONNEL

La personne à qui le confident révèle une information doit avoir légalement la qualité voulue pour recevoir la confidence. Ainsi, l'avocat doit être membre en règle de sa corporation (116).

Si l'on impose cette règle au journaliste, il faudra que soient clairement définies - législativement ou judiciairement - les conditions requises pour qu'un journaliste soit un professionnel en règle.

C- LA REVELATION CONFIDENTIELLE

Sur ce point, deux questions surgissent:

1) Qu'est-ce qu'une révélation confidentielle ?

2) A qui appartient la révélation confidentielle ?

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(116) Voir re United States v. Mammoth Oil Co., (1925) 2 D.L.R. 966.

1- QU'EST-CE QU'UNE REVELATION CONFIDENTIELLE ?

Tout fait révélé dans le cadre des relations professionnelles n'est pas automatiquement protégé devant les tribunaux: la communication doit être nécessaire ou utile à l'avis sollicité (117). De plus, le fait susceptible de devenir confidentiel par la volonté expresse ou implicite du confident doit en être un que ce dernier n'a pas intérêt à dévoiler publiquement (118).

D'autre part, les communications confidentielles comprennent non seulement les déclarations orales du confident, mais également les documents nécessaires au service requis et les faits constatés par le professionnel dans le cadre de la consultation.

Par contre, toute révélation faite par un confident alors qu'il poursuit une fin illégale ou toute communication relative à un acte frauduleux ne jouit d'aucune protection devant nos tribunaux (119).

Le problème se pose différemment dans le cas du journaliste, à cause de la nature des révélations reçues. Contrairement au client qui vient se confier à un avocat, l'informateur du journaliste désire que sa confidence soit transmise au public. Alors, ce qu'il faut, ce n'est pas de préciser la nature de la communication elle-même, mais de définir ce qu'est une source ou un informateur.

De plus, il faudrait se demander si toute révélation faite à un journaliste peut être dite confidentielle. Dans ce cas, il serait important de savoir si la qualification de la révélation doit

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(117) Voir Irénée LAGARDE. Deuxième supplément du Droit Pénal Canadien, p. 527.

(118) Voir Malborough Hotel Co. Ltd. v. Parkmaster (Canada) Ltd., (1959) 17 D.L.R. 2d 720.

(119) Voir Regina v. Bennett, (1963) 41 C.R. 227; Re Goodman and Carr and Minister of National Revenu, (1968) 70 D.L.R. 2d 670; Re Kask, (1966) 49 C.R. 209.

être effectuée par la source ou par le journaliste.

Enfin, il serait important de s'interroger sur le type de protection que peut recevoir un journaliste lorsqu'il est impliqué dans une situation de nature criminelle ou lorsque l'ordre public est menacé par la révélation d'une information.

Il est vrai que le journaliste n'a pas pour rôle, en tant que tel, d'informer les forces de l'ordre lorsqu'elles enquêtent sur des actes criminels. Par contre, son témoignage pourrait souvent aider à en prévenir la commission. Depuis quelques années, la presse doit constamment faire face à ce dilemme, notamment lorsque des organisations terroristes se confient à des journalistes ou lorsque des documents secrets appartenant à l'Etat tombent entre leurs mains.

Nous en revenons toujours à cette opposition fondamentale entre le droit du public à l'information et le devoir de tout citoyen de collaborer à la protection de la société et à l'administration de la justice.

2- A QUI APPARTIENT LA REVELATION CONFIDENTIELLE ?

Nous avons déjà abordé brièvement cette question. Vu son importance, nous croyons qu'il est utile d'en faire une analyse sérieuse.

En France et en Belgique, les professionnels doivent garder, de façon absolue, le secret des confidences qui leur sont faites. Il s'agit d'une obligation personnelle qui ne souffre pas d'exceptions et dont la violation est sanctionnée par le Code pénal. Ainsi, l'article 378 du Code pénal français stipule que:

> "Les médecins, chirurgiens et autres officiers de santé, ainsi que les pharmaciens, les sages-femmes et toutes autres personnes dépositaires, par état ou profession ou par fonctions temporaires ou permanentes, des secrets qu'on leur confie, qui, hors le cas où la loi les oblige ou les autorise à se porter dénonciateurs, auront révélé ces secrets, seront punis d'un emprisonnement d'un à six mois et d'une amende de 500 à 3000 francs". (120)

La notion de "privileged communications" du droit anglais et du droit américain, diffère totalement en ce sens que le fait de ne pas être contraint de témoigner devant les tribunaux est un privilège pour le conseiller juridique - la common law n'admettant que le secret professionnel des hommes de loi -; en conséquence, la loi ne prévoit pas de sanctions pénales pour la violation de ce secret (121). Ce privilège est évidemment sujet à contrôle par les tribunaux et le confident peut relever l'avocat de son secret (122).

Devant les tribunaux civils du Québec, les professionnels mentionnés à l'article 308 C.P. jouissent d'un privilège de ne pas témoigner, comme en common law; cependant, alors qu'en common law c'est la communication elle-même qui est protégée, au Québec c'est le confident qui bénéficie de cette protection. D'autre part, puisque les lois des corporations professionnelles imposent à leurs membres l'obligation au secret, nous en arrivons à une situation paradoxale pour le professionnel lui-même: son obligation au silence, en vertu de la loi de sa corporation, se transforme en un droit au silence devant la Cour, grâce à l'article 308 C.P.

On peut donc affirmer que, dans le droit québécois, le secret appartient au confident (123).

Dans le cas du journaliste, il faut se demander quelle serait la meilleure attitude à adopter, si le législateur jugeait à propos de leur accorder une protection. Devrait-on privilégier la communication

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(120) L'article 458 du Code pénal belge est similaire.
(121) Voir J.T. ALVES. "Confidentiality in Social Work", Catholic University of America Press, Washington D.C., 1959, à la page 52.
(122) Voir François AQUIN. "Le secret professionnel du notaire", (1970) 73 R. du N. 208, à la page 224.
(123) En droit criminel canadien, l'on applique les règles de la common law.

elle-même; ce qui aurait pour effet de le tenir au silence si son informateur ne lui permet pas - implicitement ou expressément - de parler ? Ou encore, le journaliste pourrait-il avoir un privilège de ne pas témoigner, la décision étant alors laissée à son entière discrétion ? Nous pourrions penser à une troisième hypothèse - toute théorique, à notre avis - selon laquelle le journaliste aurait une obligation absolue, assortie de sanctions pénales en cas de violation, de taire toute information reçue confidentiellement.

Nous pouvons donc en induire que, si la protection appartient au journaliste, il est libre de prendre la décision qui lui semble la meilleure lorsqu'il est appelé à témoigner. Par contre, si le secret appartient à l'informateur, il faudrait alors se demander si la renonciation par son confident lui crée une obligation de rendre témoignage ou le libère simplement de la conséquence de ses actes s'il décide de divulguer l'information obtenue confidentiellement (124).

Encore une fois, il y a matière à options et la décision à prendre repose essentiellement, selon nous, sur des considérations qui ne sont pas d'ordre juridique.

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(124) La notion de "waiver", que l'on retrouve en droit américain, est analysée dans "Notes: Reporters and their Sources: the Constitutional Right to a Confidential Relationship", The Yale L.J. 80: 317 (1970), à la page 369.

PARTIE III - DIVERSES HYPOTHESES

Dans cette partie, nous tenterons de présenter les principales hypothèses susceptibles de guider le législateur québécois dans sa recherche d'une solution concernant le privilège du journaliste. Nous regroupons nos propos sous deux titres principaux:

A- La protection de l'information confidentielle.

B- Les techniques législatives.

A- LA PROTECTION DE L'INFORMATION CONFIDENTIELLE

1- PREMIERE HYPOTHESE: Le journaliste ne bénéficie d'aucun privilège et doit rendre témoignage comme tout autre témoin.

Selon cette hypothèse, le législateur maintient le "statu quo". Comme nous l'avons vu précédemment, notre province n'est actuellement pas seule à refuser au journaliste une protection particulière devant les tribunaux. On peut même affirmer que c'est présentement l'hypothèse la plus répandue dans le monde occidental.

Le rapport de la Commission Davey suggère formellement cette solution:

"Est-ce que ce secret devrait être reconnu ? Nous ne le croyons pas. Les échanges entre les avocats et leurs clients sont placés sous le sceau du secret depuis le XVIe siècle, et il a plusieurs autres secteurs de communication (par exemple entre un médecin et un patient, un prêtre et une personne qui se confesse ou entre mari et femme) auxquels on a reconnu le privilège du secret.

Mais nous ne pouvons accepter l'argument selon lequel ces formes de relations sont analogues à celles qui existent entre un journaliste et son informateur. Sous l'empire du droit commun, il est généralement admis que la reconnaissance du privilège du secret exige quatre conditions fondamentales: (a) Il doit être entendu en toute confiance que la communication ne sera pas dévoilée; (b) le caractère confidentiel de la communication doit être essentiel au maintien total de rapports satisfaisants; (c) la relation en cause doit en être une qui, aux yeux de la communauté, mérite qu'on la soutienne avec application; et enfin (d) il faut que le tort qui serait fait à l'état de cette même relation par le dévoilement de la confidence dépasse en importance les avantages juridiques possibles de la violation du secret.

Il n'y a manifestement là aucun critère applicable aux rapports qui existent entre le journaliste et son informateur. La notion admise de privilège du secret implique que l'on connaît l'identité des deux parties concernées, et c'est le caractère confidentiel de la communication elle-même que l'on protège, beaucoup plus que l'identité du confident. Ainsi le privilège du secret vise normalement à protéger l'informateur; mais appliqué aux journalistes, le secret protégerait avant tout la personne qui reçoit la communication. Enfin le journaliste peut revendiquer le privilège du secret pour n'importe quel genre d'information, confidentielle ou non, alors que de façon générale ce même privilège ne s'invoque, traditionnellement, qu'à l'égard de communications confidentielles.

Au reste, le journalisme est une profession où il existe encore aucun standard clairement reconnu: c'est donc à des inconnus qu'on étendrait la protection du secret professionnel, et on voit difficilement comment on pourrait ainsi servir l'intérêt public. Notre opinion est à ce sujet fort simple, et nous croyons que la majorité des journalistes la partagent: c'est que nous devrions laisser les choses comme elles sont. Il se peut qu'à l'occasion, des journalistes se sentent dans l'obligation morale de faire de la prison plutôt que de dénoncer leurs sources; qu'il en soit alors tout simplement ainsi. On peut s'attendre avec confiance, nous en sommes convaincus, que les autorités judiciaires appliqueront la loi avec

tous les égards qui conviennent à la sensibilité professionnelle des journalistes. Nous avons par ailleurs la certitude que la plupart des reporters prendraient un court séjour en taule comme une expérience non seulement rafraîchissante, mais même avantageuse.

En d'autres mots, nous estimons que l'on devrait éviter de donner aux journalistes, devant les tribunaux, des privilèges que n'ont pas tous les autres citoyens. Nous croyons également que la protection donnée aux mécanismes de reportage par le privilège du secret journalistique ne ferait pas le poids des effets désavantageux qu'elle pourrait avoir sur le fonctionnement de l'appareil judiciaire." (125)

Puis la Commission poursuit:

"...Toute loi qui exempterait les journalistes de l'obligation de témoigner d'un crime qu'ils auraient vu commettre, ou de celle d'aider la police à faire enquête au sujet du même crime, aurait des effets désastreux sur l'administration de la justice.

On nous permettra de reprendre ici les observations que nous avons faites antérieurement au sujet du secret journalistique: les privilèges et les exemptions particulières iraient mal à un milieu - celui de la presse - qui, au sein de notre société, ne peut prétendre à un statut juridique différent de celui de n'importe quel citoyen. Ils seraient d'autant plus inopportun que l'absence de normes professionnelles ne permettrait pas de savoir clairement à qui ces mêmes privilèges pourraient être accordés.

Le fait est que les manifestations seront de plus en plus nombreuses dans nos rues, et que la situation qui s'est révélée à Montréal prendra de plus en plus d'acuité. Mais tout en admettant que la solution cloche un peu, nous nous bornerons à recommander que la police et la presse, dans toutes les localités, fassent des efforts en vue de placer leurs relations professionnelles sur une base qui réduira les dangers qu'on peut discerner actuellement. Les plus légitimes efforts de l'appareil policier n'excusent pas que l'on traite des journalistes comme s'ils étaient des enquêteurs bénévoles. Inversement, les reporters ne peuvent se réclamer de la liberté de la presse pour se soustraire à toute obligation envers l'appareil judiciaire. La meilleure solution, si imparfaite qu'elle soit, serait une affaire de gentlemen. Il conviendrait que la police résiste à la tentation de se livrer à des expéditions de pêche continuelles,

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(125) Les Mass Media, vol. I, rapport du Comité Spécial du Sénat sur les moyens de communications de masse, p. 117.

> et restreigne ses demandes de documents à des causes dont l'importance justifie l'émission d'un mandat. De son côté, la presse, sans aller jusqu'à faire preuve de mauvais esprit, devrait exiger inlassablement le respect de ses droits." (126)

Il est bon de souligner les sanctions prévues par notre Droit, lorsque le journaliste, par respect de son code d'éthique, ou pour d'autres motifs, refuse de se soumettre aux prescriptions de la loi. S'il ne se présente pas en Cour, alors qu'il a été régulièrement assigné à comparaître, le juge peut décerner contre lui un mandat d'amener et ordonner qu'il soit détenu sous garde jusqu'à ce qu'il ait rendu témoignage ou qu'il ait été libéré sous caution (127). S'il se présente et refuse de rendre témoignage, il se rend coupable d'outrage au tribunal (128) et il est passible d'une amende n'excédant pas cinq mille dollars ou d'un emprisonnement pour une période d'au plus un an (129).

2- DEUXIEME HYPOTHESE: Le journaliste ne bénéficie légalement d'aucun privilège mais il profite "de facto" d'une certaine forme de protection.

L'entente qui semble prévaloir, depuis plus de cent ans, en Belgique, entre les tribunaux et les journalistes illustre ce type de protection factuelle (130). Egalement, les directives que le procureur général des Etats-Unis, M. Mitchell, avait données à ses officiers, en 1970, constituent une seconde illustration de cette protection para-juridique.

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(126) Ibid. p. 120.
(127) A. 284 C.P.
(128) A. 313 C.P.
(129) A. 51 C.P.
(130) Voir page 30 supra.

Il faut toutefois préciser que le journaliste ne possède alors aucune garantie reconnue par la loi. S'il survient une crise quelconque dans le pays ou un changement d'attitude de la part des tribunaux ou du gouvernement, il redevient alors un témoin contraignable comme tout citoyen ordinaire. Cette protection est donc très aléatoire.

3- TROISIEME HYPOTHESE: Le journaliste bénéficie d'une protection partielle.

Sans lui reconnaître un privilège formel, le législateur l'assure qu'il ne sera pas poursuivi pour outrage au tribunal, s'il refuse de rendre témoignage. C'est ce que prévoient actuellement les lois de l'Etat de Californie et de l'Etat de New-York.

Comme le précisait le "Assembly Committee on the Judiciary" de la Californie, lors de l'étude du projet de loi:

> "It should be noted that Section 1070, like the existing law, provides an immunity from being adjudged in contempt; it does not create a privilege. Thus, the section will not prevent the use of other sanctions for refusal of a newsman to make discovery when he is a party to a civil proceeding".

4- QUATRIEME HYPOTHESE: Le journaliste bénéficie d'une protection totale pouvant être assujettie à des restrictions légales ou judiciaires.

Vu les multiples facettes que peut prendre cette hypothèse, nous en ferons une présentation schématique.

a) Objet possible de la protection : - les sources (ou l'identité de l'informateur)

- les sources et l'information confidentielle elle-même

b) Types de restrictions :

1- quant au fond : - v.g. danger qu'il y ait déni de justice

- prédominance de l'intérêt public ou de la sécurité de l'Etat

- information essentielle pour prévenir une menace à la vie humaine

2- quant au forum : choix des instances devant lesquelles la protection peut être reconnue

3- quant aux personnes: choix des types de journalistes à qui le privilège est accordée

4- quant aux media : choix des types de media pour lesquels les journalistes travaillent

c) Rôle du juge : - discrétion absolue d'accorder ou de refuser le privilège

- discrétion relative: pouvoir du juge de prendre en considération certains critères définis par le législateur:

v.g. - nature du litige
- possibilité d'obtenir la preuve par d'autres moyens
- pertinence de la source

- obligation pour le juge de respecter certaines limites telles que l'intérêt public, l'"overriding national interest"

d) Fardeau de la preuve : - preuve par le journaliste à l'effet qu'il ne devrait pas être appelé à rendre témoignage

- preuve par celui qui désire l'information à l'effet que le témoignage du journaliste est nécessaire.

Comme on peut le constater, ce schéma nous laisse entrevoir les multiples avenues qui s'offrent au législateur dans ce domaine. Il lui est donc loisible de choisir entre une protection absolue des sources et de l'information confidentielle et d'autres formes de protection plus mitigées, selon l'option qui lui semble la meilleure, eu égard au contexte socio-juridique.

B- LES TECHNIQUES LEGISLATIVES

Avant d'aborder ce sujet, il est essentiel de souligner le problème constitutionnel auquel nous devons faire face, au Canada. En effet, puisque le Québec ne peut légiférer en matière criminelle, il ne saurait être question que le journaliste obtienne une protection à l'occasion de procédures criminelles, à moins que le gouvernement fédéral n'accepte de la lui octroyer formellement. Il faut faire cette même réserve au sujet d'instances soumises à des tribunaux constitués par le gouvernement fédéral.

Plusieurs moyens s'offrent au législateur, s'il désire accorder au journaliste une protection judiciaire. Nous nous permettons d'en citer un certain nombre que pourrait retenir le législateur québécois:

1- Adoption par l'Etat d'une Déclaration québécoise des Droits de l'Homme, dans laquelle il insérerait un article à ce sujet.

2- Adoption par l'Etat québécois d'une loi qui rendrait applicable au Québec la Déclaration Canadienne des Droits de l'Homme, lorsque celle-ci protégera valablement le journaliste.

3- Adoption d'une loi particulière portant sur la protection du journaliste.

4- Adoption d'une loi corporative pour les journalistes du Québec - à l'instar des autres professions - qui contiendrait une disposition relative au privilège du journaliste.

5- Adoption d'une Loi de la Presse.

6- Adoption d'un article particulier à ce sujet, dans le Code de procédure civile.

7- Amendement à l'article 308 du Code de procédure civile.

N.B. L'on doit noter que, vu le problème constitutionnel, ces actes législatifs ne pourraient trouver d'application que dans le champ fort restreint des compétences québécoises. Aussi faudrait-il que l'Etat fédéral légifère également pour que le journaliste reçoive une protection complète devant tous les tribunaux et dans toutes les matières.

CONCLUSION

A notre avis, la principale constatation que l'on puisse faire, au terme de notre étude, c'est que le problème est fort complexe et qu'il n'existe aucune formule magique qui permette de le résoudre. On constate, en effet, que l'Etat et le journaliste sont tous deux à la recherche de l'information, mais que leurs objectifs diffèrent fondamentalement: c'est là que s'affrontent les deux principes majeurs que nous avons mentionnés précédemment, soit le droit du public à l'information - qui implique la protection des sources du journaliste - et le droit du public à une saine administration de la justice - qui exige que toute personne détenant une information soit tenue de la révéler lorsqu'elle en est requise devant les tribunaux.

D'autre part, il nous semble primordial que les journalistes eux-mêmes se définissent plus clairement. Jusqu'à date, ils ont indiqué les cadres de leurs activités mais ils n'ont pas encore fait connaître les critères professionnels qui devraient constituer les assises de leur profession. Lorsque ces éléments seront précisés, le législateur sera alors en mesure de mieux évaluer la situation.

Enfin, nous croyons devoir répéter que les décisions à prendre ne sont nullement, quant au fond, de nature juridique. Car, sur des questions de cet ordre, le Droit a pour fonction de formuler, dans des termes qui puissent les rendre exécutoires, les choix socio-politiques du législateur.

Hubert Reid

Kathleen D. Beausoleil

Québec, le 19 avril 1972.

ADDENDUM

Nous avons jugé opportun de reproduire, en annexe, à titre documentaire, le texte intégral d'une étude américaine très récente de Mr. Vince Blasi, intitulée: "The Newsman's Privilege: An Empirical Study" (1). Cette étude empirique du professeur Blasi nous paraît constituer un complément utile, voire nécessaire, à notre étude des implications juridiques du secret professionnel du journaliste.

M. Blasi a effectué, par voie postale, une enquête socio-juridique auprès de soixante-sept reporters américains et il a interviewé quarante-sept reporters et "editors" de New-York, Washington D.C., Chicago, Detroit, Los Angeles, San Francisco et Denver.

Nous croyons toutefois que les conclusions de son étude ne sauraient être retenues définitivement dans un contexte socio-juridique québécois sans être confrontées avec les réactions et suggestions des personnes, organismes ou associations les plus directement intéressées.

De plus, nous souhaiterions que l'enquête de M. Blasi soit reprise éventuellement au Québec.

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ANNEXE I

TABLEAU DE SCHROETER

PROTECTION OF CONFIDENTIALITY IN

THE COURTS: THE PROFESSIONS.

by G. Schtoeter
Social Problems
16: 376-386 - W. 1969, 380.

DISTRIBUTION OF PRIVILEGED COMMUNICATION STATUTES AND DATE OF ENACTMENT BY GEOGRAPHICAL REGION

State	Professions					
	Clergy-man	Physician	Psychis-trist only	Psycho-logist	Accountant	Public School Counselor
			a) NORTHEAST			
Maine	1965			1967		
New Hampshire				1957		
Vermont	1896					
Massachusetts	1962					
Connecticut	1967		1961			
Rhode Island	1960					
New York	1828	1828				
Pensylvania	1959	1895			1961	
New Jersey	1947					
			b) SOUTH			
Delaware	1961	1960		1962		
Maryland	1957		---1966---		1924	
Virginia	1962	1956		1966		
West Virginia	1863	1863				
North Carolina	1959	1885		1967		
South Carolina	1959					
Georgia	1951		1959	1951	1943	
Florida	1959		1965	1965	1905	
Alabama				1963		
Mississipi		1906		1966		
Louisiana	1928	1928		1964	1924	
Kentucky	1876		1966	1964	1946	
Tennessee	1959		1965	1953	1939	
Arkansas	1848	1848		1955		
Texas	1967					
Oklahoma	1893	1893		1965		
			c) NORTH CENTRAL			
Ohio	1853	1853				
Indiana	1852	1852				
Michigan	1856	1856		1959	1925	1965
Illinois	1961	1959		1963	1943	
Wisconsin	1878	1839				
Minnesota	1851	1851				
North Dakota	1877	1877				
South Dakota	1903	1903				
Nebraska	1883	1883		1967		
Kansas	1855	1855		1967		
Iowa	1851	1851			1929	
Missouri	1835	1835			1967	

SUITE...

State	Clergy-man	Physician	Psychia-trist only	Psycho-logist	Accountant	Public School Counselor
			d) WEST			
Montana	1867	1867		1935		
Idaho	1881	1881		1963	1963	
Washington	1854	1854		1955		
Oregon	1862	1862		1963		
Utah	1888	1888		1959		
Colorado	1883	1883		1961	1930	
Wyoming	1876	1886		1965		
Nevada	1881	1881		1963	1957	
New Mexico	1929	1929		1963	1929	
Arizona	1901	1901		1965	1933	
California	1872	1872		1957		
Alaska	1913	1913				
Hawai	1876	1876				

ANNEXE II

LÉGISLATION DES ÉTATS ET BILL FÉDÉRAL (U.S.A.)

92D CONGRESS
1ST SESSION

S. 1311

IN THE SENATE OF THE UNITED STATES

MARCH 23, 1971

Mr. PEARSON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide certain privileges against disclosure of confidential information and the sources of information obtained by newsmen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Newsmen's Privilege Act".

NONDISCLOSURE OF CONFIDENTIAL INFORMATION

SEC. 2. Except as provided in section 4, no person shall be required by any court, grand jury, agency, department, or commission of the United States or by either House of or any committee of Congress to disclose any confidential information received or obtained by him in his capacity as a re-

action for defamation, asserts a defense based on the source of such information; or

(2) to the source of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the United States.

(c) In any case where a person claims a privilege conferred by section 2 or 3, the person seeking the information may apply to the United States district court for an order divesting the privilege. Such application shall be made to the district court in the district wherein the hearings, action, or other proceeding in which the information is sought is pending. The order shall be granted if the court, after hearing the parties, determines that there is substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage, or foreign aggression.

ETAT D'ALABAMA.

Code Tit. 7 § 370 (1960)

§370. Newspaper, radio and television employees. - No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed. (1935, p. 649; 1949, p. 548, effective Aug. 9, 1949.)

ETAT D'ALASKA.

Comp. Laws Ann. § 09.25.150, 160 (Supp. 1970)

Sec. 09.25.150. Claiming of privilege by public official or reporter. Except as provided in § § 150 - 220 of this chapter, no public official or reporter may be compelled to disclose the source of information procured or obtained by him while acting in the course of duties as a public official or reporter. (§ 1 ch 115 SLA 1967)

Editor's note.-Section 2, ch. 115, SLA 1967, provides: "This will changes Rule 43(h) of the Supreme Court Rules (of Civil Procedure) by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.160. Challenge of privilege. (a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to question him in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made instanter by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.

(b) The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest. (§ 1 ch 115 SLA 1967)

Sec. 09.25.170. Order divesting public official or reporter of the privilege. (a) This section is applicable to a hearing held under the laws of this state

(1) before a court other than the supreme or a superior court;

(2) before a court commissioner, referee, or other court appointee;

(3) in the course of legislative proceedings or before a commission, agency or committee created by the ligislature;

(4) before an agency or representative of an agency of the state, borough, city or other municipal corporation, or other body; or

(5) before any other forum of this state.

(b) If, in a hearing, a public official or a reporter should refuse to divulge the source of his information, the agency body, person, official, or party seeking the information may apply to the superior court for an order divesting the official or reporter of the privilege.

ETAT D'ARIZONA.

Rev. Stat. Ann. § 12-2237 (Supp. 1970)

§ 12-2237. Reporter and informant.

A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of ingormation procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed. As amended Laws 1960, Ch. 116, § 1.

ETAT D'ARKANSAS.

Stat. Ann. § 43-917 (1964)

ARK. STAT. ANN. § 43-917 (1964)

43-917. Newspaper or radio privilege. -Before any editor, reporter, or other writer for any newspaper or periodical, or radio station, or publisher of any newspaper or periodical or manager or owner of any radio station, shall be required to disclose to any Grand Jury or to any other authority, the source of information used as the basis for any article he may have written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare. (Init. Meas. 1936, No. 3, § 15, Acts 1937, p. 1384; Pope's Dig., § 3828; Acts 1949, No. 254, § 1, p. 761.)

ETAT DE CALIFORNIA.

C. Ann., § 1070 (1965)

§ 1070. Newsman's refusal to disclose news source. - A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television. (Stats. 1965, c.299, § 1070.)

ETAT D'INDIANA.

Stat. Ann. § 2-1733 (1968)

2-1733. Newspapers, television and radio stations - Press associations - Employees and representatives - Immunity - Any person connected with a weekly, semiweekly, triweekly or daily newspaper that conforms to postal regulations, which shall have been published for five (5) consecutive years in the same city or town and which has a paid circulation of two per cent (2%) of the population of the county in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station or television station, whether published or not published in the newspaper or by the press association or broadcast or not broadcast by the radio station or television station by which he is employed. (Acts 1941, ch. 44, § 1, p. 128; 1949, ch. 210, § 1, p. 673.)

ETAT DE KENTUCKY.

Rev. Stat. Ann. § 421.100 (1969)

421.100 (1649d-1) Newspaper, radio or television broadcasting station personnel need not disclose source of information. No person shall be compelled to disclose in any legal proceeding or trial before any court,

or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged of employed, or with which he is connected. (1952, c.121; effective June 19, 1952)

ETAT DE LOUISIANA.

Rev. Stat. Ann. §§ 45: 1451-54 (Supp. 1971)

Part I. Reporters

§ 1451. Definitions

"Reporter" shall mean any person regularly engaged in the business of collecting, writing or editing news for publication through a news media. The term reporter shall include all persons who were previously connected with any news media as aforesaid as to the information obtained while so connected.

"News Media" shall include

a) Any newspaper or other periodical issued at regular intervals and having a paid general circulation;

b) Press associations;

c) Wire service;

d) Radio;

e) Television; and

f) Persons or corporations engaged in the making of news reels or other motion picture news for public showing. Acts 1964, No 211, § 1.

§ 1452. Conditional privilege from compulsory disclosure of Informant or source.

Except as hereinafter provided, no reporter shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter. Acts 1964, No. 211, § 2.

§ 1453. Revocation of privilege; procedure

In any case where the reporter claims the privilege conferred by this Part, the persons or parties seeking the information may apply to the district court of the parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the information is sought is pending. The application for such an order shall set forth in writing

the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be applicable under Article 2083 of the Louisiana Code of Civil Procedure. In case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of such appeal. Acts 1964, No. 211, § 3.

§ 1454. Defamation; burden of proof

If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alieges to have obtained information from a confidential source, the burden of proof shall be on the reporter or news media to sustain this defense. Acts 1964, No. 211, § 4.

ETAT DE MARYLAND.

Code Ann. Art. 35 § 2 (1971)

§ 2. Employees on newspapers of for radio or television stations cannot be compelled to disclose source of news or information.

No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed. (An. Code, 1951, § 2; 1939, § 2; 1924, § 2; 1912, § 2; 1904, § 2; 1896, ch. 249; 1949, ch. 614.)

ETAT DE MICHIGAN.

C.L. 767. 5a (1968)

767.5a Same; certain communications declared privileged and confidential

Sec. 5a. In any inquiry authorized by this act communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential. Any communications between attorneys and their clients, between clergymen and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, chergymen, or physicians to serve as such attorney, clergyman, or physician. P.A. 1927, No. 175, c. VII, § 5a, added by P.A. 1949, No. 311, § 1, Eff. Sept. 23, 1949, as amended P.A. 1951, No. 276, § 1, Eff. Sept. 28.

ETAT DE MONTANA.

R. Code Ann. Tit. 93 §§ 601-1 to 2 (1971)

93-601-1. Reporters' Confidence Act. This act shall be known and may be cited as the Reporters' Confidence Act.

History: En. Sec. 1, Ch. 195, L. 1943.

93-601-2. Disclosure of source of information - when not required. No persons engaged in the work of, or connected with or employed by any newspaper or any press association, or any radio broadcasting station, or any television station for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting or televising news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial or investigation before any court, grand jury or petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent or agents, or before any commission, department, division or bureau of the state, or before any county or municipal body, officer or commitee thereof.

ETAT DE NEVADA.

Rev. Stat. § 48: 087 (1968)

48.087 Disclosure of information source by reporters, editorial personnel of news media, radio and television stations. No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.

2. Before the legislature or any committee thereof.

3. Before any department, agency or commission of the state.

4. Before any local governing body or committee thereof, or any officer of a local government.

(Added to NRS by 1969, 846)

ETAT DE NEW MEXICO.

Stat. Ann. § 20-1-12.1 (Supp. 1970)

20-1-12.1. Privileged communication - Reporters. - A. It is hereby declared to be the public policy of New Mexico that no reporter shall be required to disclose before any proceeding or by any authority the source

of information procured by him in the course of his employment as a reporter for a news media unless disclosure be essential to prevent injustice. In granting or denying a testimonial privilege under this act (section), the court shall have due regard to the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove. An order compelling disclosure shall be appealable, and subject to stay.

B. As used in this section:

(1) "reporter" means any person regularly engaged in the business of collecting, writing or editing news for publication through a news media, and includes any person who was a reporter at the time the information was obtained but is no longer acting as a reporter; and

(2) "news media" means any newspaper or other periodical issued at regular intervals and having a paid general circulation; a press association; a wire service; a radio station or a television station.

C. Any reporter may waive the privilege granted in this section.

STAT DE NEW YORK.

Cons. L. Ann., § 79-h., (1971)

§ 79-h. Special provisions relating to persons employed by, or connected with, news media

(a) Definitions. As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.

(2) "Magazine" shall bean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second class matter.

(3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing or editing of news for a newspaper, magazine, news agency, press association or wire service.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "News" shall mean written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newseaters from contempt.

Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

Added L. 1970, c.615, eff. May 12, 1970.

ETAT D'OHIO.

Rev. Code Ann. § 2739.04, .11 et .12 (Baldwin 1970)

2739.04 Revelation of news source by broadcasters.

No person engaged in the work of, or connected with, or employed by any commercial radio broadcasting station, or any commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

Every commercial radio broadcasting station, and every commercial television broadcasting station shall maintain for a period of six months from the date of its broadcast thereof, a record of those statements of information the source of which was procured or obtained by persons employed by the station in gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news.

Record as used in this section shall include a tape, disc, script or any other item or document which gets forth the content of the statements which are required by this section to be recorded. (128 v 140. Eff. 8-26-59.)

NEWSPAPERS

2739.11 (6319-2). Definitions.

Any person, firm, partnership, voluntary association, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of printing or publishing a newspaper, magazine, or other periodical sold or offered for sale in this state, is a newspaper company, and may such newspaper, magazine, or other periodical publication is a newspaper within the meaning of sections 2739.13, inclusive, of the Revised Code.

2739.12 (6319-2a). Newspaper reporters not required to reveal source of information.

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

ETAT DE PENNSYLVANIA.

Stat. Ann. Titl. 28 § 330 (Supp. 1971)

§ 330. Confidential communications to news reporters.

(a) No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee hereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof.

(b) The provisions of subsection (a) hereof in so far as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast ot telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast. As amended 1959, Dec. 1, P.L., 1669, § 1; 1968, July 31, P.L. -, No 255, § 1.

ANNEXE III

LE PRIVILÈGE DU JOURNALISTE AUX ÉTATS-UNIS

LE PRIVILEGE DU JOURNALISTE AUX ETATS-UNIS

I- ETATS	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE LA PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
Alabama (1935)	Source	Nil	Oui	Personne à l'emploi ou reliée à un journal, un poste de radio ou de télévision	Journal ou poste de radio ou de télévision	Toute procédure judiciaire au procès devant tout tribunal, "grand jury" de tout tribunal, président de tout tribunal ou son (ses) représentants ou agent (s), tout comité de la législature ou tout autre endroit.
Alaska (1967)	Source	- Danger de déni de justice - Intérêt public	Nil	Reporter	Nil	Nil
Arizona (1937)	Source	Nil	Oui	Personne exerçant son activité dans un journal, un poste de radio, de télévision ou un travail de reportage, ou reliée à ou employée par un journal, un poste de radio, de télévision	Journal, radio, télévision	Une procédure judiciaire ou procès, ou procédure de tout genre, ou devant tout jury, organisme d'enquête ou commission, ou devant un comité de la législature, ou tout autre endroit.
Arkansas (1936)	Source	Information publiée, écrite ou mise en ondes de bonne foi, sans intention malicieuse et dans l'intérêt du public	Oui	"Editor", reporter ou autre personne qui écrit pour un journal, un périodique ou un poste de radio, ou "publisher" de tout journal ou périodique, ou gérant ou propriétaire de tout poste de radio	Journal, périodique, radio	Tout "Grand jury" ou tout autre corps constitué.

I- ETATS	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE LA PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
California (1965)	Source	Aucune condamnation possible pour outrage au tribunal	Oui	"Publisher", "editor", reporter, ou autre personne reliée à ou à l'emploi d'un journal, d'une association de presse, d'un "wire service", ou d'un poste de radio ou de télévision	Journal, association de presse, "wire radio", télévision	Un tribunal, la législature ou tout organisme administratif.
Indiana (1941)	Source	Nil	Non	Toute personne reliée à un journal hebdomadaire, bi-hebdomadaire, tri-hebdomadaire ou quotidien obéissant à la réglementation postale, qui doit avoir été publiée pendant au moins cinq années consécutives dans la même cité ou ville et qui a un tirage commercial de 2% de la population du comté dans lequel il est publié, ou une association de presse reconnue de même qu'un "bona fide owner", employé rattaché à l'édition ou au reportage, qui tire sa principale source de revenus de la cueillette, rédaction, préparation et de l'interprétation des informations, et toute personne reliée à un poste de radio ou de télévision détenant un permis d'opération commerciale, tel qu'un propriétaire, administrateur, ou employé rattaché à l'édition ou au reportage qui tire sa principale source de revenus de la	Journal hebdomadaire, bi-hebdomadaire, tri-hebdomadaire, et quotidien qui doit avoir été publié pendant cinq années consécutives et qui a un tirage commercial de 2% de la population du comté où il est publié, association de presse, poste de radio ou de télévision détenteur d'un permis d'opération commerciale	Toute procédure judiciaire ou tout autre endroit.

I- ETATS	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE LA PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
				cueillette, la rédaction la préparation, l'interprétation et la mise en ondes des informations		
Kentucky (1936)	Source	Nil	Oui	Toute personne à l'emploi ou reliée à un journal	Journal, postes de radio ou de télévision	Toute procédure judiciaire ou procès devant tout tribunal, "grand jury" ou "petit jury", président de tout tribunal, ou son (ses) agent(s), l'Assemblée Générale ou tout comité de ladite Assemblée, ou tout corps législatif de la cité ou du comté, ou tout comité y subordonné, ou tout autre endroit.
Louisiana (1964)	Source ou identité de tout informateur	Révocation possible dans l'intérêt public sur requête	Non	Reporter (toute personne exerçant son activité dans le domaine de la cueillette, de la rédaction ou de la préparation des nouvelles pour fins de publication dans des media d'information; personnes ou corporations exerçant leur activité dans la production de de films d'actualité destinés au public en général	Journal ou autre périodique publié à intervalles réguliers et ayant un tirage commercial général; une association de presse; agence de presse; radio, télévision	Toute procédure administrative, judiciaire ou législative ou tout autre endroit.
Maryland (1896)	Source	Nil	Oui	Personne exerçant son activité dans, reliée à ou employée par un journal ou tout poste de radio ou télévision	Journal, radio, télévision	Toute procédure judiciaire, procès devant tout comité de la législature ou autre endroit.

I- ETATS	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE LA PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
Michigan (1949)	Source et information confidentielle	Nil	Non	Reporters de journaux ou autres publications	Journal ou autre publication	Enquêtes criminelles autorisées par la loi.
Montana (1943)	Source	Nil	Non	Personnes exerçant leur activité dans, reliées à, ou employées par tout journal ou toute association de presse, ou tout poste de radio, ou télévision pour les fins de la cueillette, obtention, compilation, préparation, distribution, publication, radio-diffusion ou télédiffusion de nouvelles	Journal, association de presse, radio, télévision	Toute procédure judiciaire, procès ou enquête devant tout tribunal, "grand" ou "petit jury", ou tout officier des dits tribunaux, le président de tout tribunal, ou son (ses) agent (s) ou toute commission, département, division ou bureau de l'Etat, ou tout organisme de comté ou municipal, officier ou comité du dit organisme.
New Jersey (1933)	Source, auteur, moyens ou voies, agence, ou personne, desquelles ou par l'entremise desquelles l'information fut obtenue ou fournie	Nil	Oui	Personne exerçant son activité dans, reliée à, ou à l'emploi d'un journal	Journal	Nil
Nevada (1968)	Source	Nil	Non	"Reportorial or editorial, employee" de tout journal périodique, association de presse, poste de radio ou télévision	Journal, périodique, association de press, ou poste de radio ou télévision	Toute procédure judiciaire, procès ou enquête: 1. Devant tout tribunal, "grand jury", enquête du coroner, "jury" ou tout officier des dits organismes;

I- ETATS	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE LA PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
						2. Devant la législature ou tout comité qui en dépend; 3. Devant tout département, agence ou commission de l'Etat; 4. Devant tout organisme gouvernemental local ou comité en dépendant, ou tout officier d'un gouvernement local.
New Mexico (1967)	Source	Le tribunal doit prendre en considération la nature de la procédure, le bien-fondé de la demande ou de la défense, la suffisance de la preuve autrement accessible, la pertinence de la source, et la possibilité d'établir la même preuve par d'autres moyens que la source. La divulgation est requise quand elle est jugée essentielle pour prévenir une injustice.	Non	Reporter (toute personne exerçant son activité régulièrement dans le domaine de la cueillette, rédaction, ou préparation des informations pour fins de publication dans un medium d'information, et toute personne qui était reporter au moment où l'information fut obtenue, mais qui a cessé d'agir en cette qualité	Journal, ou autre périodique publié à intervalles réguliers et ayant un tirage commercial général; association de presse; "wire service"; postes de radio, télévision	Toute procédure ou devant tout pouvoir constitué.
New-York (1970)	Source et information confidentielle	Aucune condamnation possible pour outrage au tribunal	Non	Journaliste professionnel (défini dans la loi)	Journal, magazine, agence d'information, association de presse, "wire service", radio, télévision	Tout tribunal, la législature, ou autre organisme investi de pouvoirs de coercition (contrainte).

I- ETATS	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE LA PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
Ohio (1941)	Source	Nil	Non	Personne exerçant son activité dans, reliée à ou à l'emploi d'un journal, ou d'une association de presse, ou d'un poste de radio ou de télévision détenteur d'un permis d'opération commerciale aux fins de la cueillette, l'obtention, la compilation, la préparation, la distribution ou la publication des informations	Journal, association de presse, postes de radio et télévision	Toute procédure judiciaire procès ou enquête devant tout tribunal, "grand" ou "petit jury", le président de tout tribunal ou son (ses) agent (s), ou toute commission, département, division, bureau de l'Etat, ou tout organisme de comté ou municipal, ou officier ou comité de tel organisme.
Pennsylvania (1937)	Source et information confidentielle	Le poste de radio ou télévision doit conserver la transcription ou l'enregistrement de toute information diffusée	Non	Personne exerçant son activité dans, reliée à, ou à l'emploi d'un journal, association de presse, poste de radio ou télévision aux fins de cueillir, obtenir, compiler, préparer et publier l'information	Journal de tirage général; association de presse; radio ou télévision	Toute procédure judiciaire procès ou enquete devant tout tribunal, "grand" ou "petit jury", ou tout officier de tel organisme, devant l'Assemblée Générale ou tout comité de tel organisme, devant toute commission, département bureau de l'Etat, ou tout organisme de comté ou municipal et officier ou comité en dépendant.

II- FEDERAL	OBJET DE LA PROTECTION	RESTRICTIONS AU PRIVILEGE	NECESSITE DE PUBLICATION	PERSONNES PROTEGEES	MEDIA D'INFORMATION	FORUM DE LA PROTECTION
Bill S. 1311	Source et information confidentielle	Non application: - Publication de l'information confidentielle par la source. - Information diffamatoire invoquée dans une action civile pour diffamation. - Source d'informations devant demeurer secrètes en vertu de lois des Etats-Unis. Demande de révocation possible du privilège à la Cour de district des Etats-Unis dans les cas où la divulgation d'une information est essentielle pour prévenir une menace à la vie humaine, l'espionnage ou une pression étrangère	Non	Reporter, "editor", "commentator", journaliste, "writer", correspondant, annonceur, ou autre personne exerçant son activité directement dans le domaine de la cueillette ou de la présentation des informations	Journal, périodique, association de presse, "newspaper syndicate", "wire service", ou poste de radio et télévision	Tout tribunal, "grand jury", agence, département, ou commission des Etats-Unis, ou l'une ou l'autre Chambre ou Comité du Congrès.

ANNEXE IV

ÉTUDE EMPIRIQUE DE VINCE BLASI

THE NEWSMAN'S PRIVILEGE: AN EMPIRICAL STUDY

Vince Blasi[*]

I. The Problem

A legal issue can smolder for years until suddenly the winds of a larger controversy fan it into flame. Such has been the case with the question whether information received in confidence by journalists is entitled to a legal privilege against compulsory process.

Although dating back at least to the days of Benjamin Franklin's apprenticeship in the newspaper business,[1] the press subpoena problem remained until very recently a matter of only occasional and local significance.[2] Approximately two years ago, however, subpoenas

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The research for this article was financed in part by a grant from the Field Foundation. I have benefited greatly from the assistance and criticism of many colleagues and friends, particularly Arthur Felson, graduate student in statistics at Columbia University, and Alice Propper, graduate student in sociology at the University of Michigan.

1. One of the Pieces in our News-Paper, on some political Point which I have now forgotten, gave Offence to the Assembly. He was taken up, censur'd and imprison'd for a Month by the Speaker's Warrant, I suppose because he would not discover his Author. I too was taken up and examin'd before the Council; but tho' I did not give them any Satisfaction, they contented themselves with admonishing me, and dismiss'd me; considering me perhaps as an Apprentice who was bound to keep his Master's Secrets.

THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Yale Univ. Press 1964).

2. The problem attracted some attention in the 1950's in two much-publicized courtroom clashes. In Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), libel plaintiff Judy Garland tried to obtain the name of the unidentified "CBS network executive" who was quoted in a Marie Torre gossip column as having said that Miss Garland had lost a performing contract on account of her girth. When Miss Torre refused to divulge her source, she was held in contempt. The Second Circuit in affirming the contempt citation held that even if there is some first amendment limitation on press subpoenas, a reporter must identify her source when the information "[goes] to the heart of" the plaintiff's claim. 259 F.2d at 550. The other dispute arose when, during a challenge by convicted atomic spy Ethel Rosenberg to the conditions of her incarceration, New York Post columnist Leonard Lyons refused to divulge his source for a statement that Mrs. Rosenberg could still avoid the death penalty if she would turn state's evidence. Rosenberg v. Carroll *In re* Lyons, 99 F. Supp. 629 (S.D.N.Y. 1951). The judge rejected Lyons' contention that communications to a journalist are privileged, but ruled that in this case the source need not be divulged because the statement was not relevant to the eighth amendment claim under consideration. 99 F. Supp. at 629-30.

Two cases in the 1960's also briefly focused public attention on the problem. In *In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964), the star first baseman for the San Francisco Giants sought to discover the sources for allegedly defamatory statements about him in a magazine article. The applicable California newsman's privilege statute expressly covered only journalists employed by newspapers, wire services, press associations, and radio and television stations. Since the statute was in derogation of the common law, the court held it should not be construed to extend a privilege to magazine writers. 233 F. Supp. at 473.

began to issue against reporters in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession and a questioning by many reporters of the Government's motives. Then the Attorney General quickly issued a set of conciliatory guidelines,[3] the volume of subpoenas subsided to a less alarming level, and everyone dug in for a long legal siege.

Today, the statutory, common-law, and constitutional aspects of the long-dormant problem are being re-examined by many legislators,[4] judges,[5] and academicians.[6] The Supreme Court is scheduled to address the constitutional question some time this term.[7] I propose to enter this fray. In this article, I will report the results of an empirical survey that I have undertaken. In subsequent articles,[8] I will analyze the eighteen state statutes that grant newsmen a privilege, consider whether protection for the reporter-news source relationship is compelled by existing common-law principles, and address the question whether a newsman's privilege is properly to be inferred from the free-press clause of the Federal Constitution. Before

In State v. Buchanan, 250 Ore. 244, 248-50, 436 P.2d 729, 731, *cert. denied*, 392 U.S. 905 (1968), a student newspaper editor used fictional names in reporting an interview with seven marijuana smokers. A grand jury, rejecting the editor's claim of a first amendment privilege, demanded the real names. She then accepted a contempt citation, which was affirmed by the Oregon supreme court, and paid a $300 fine.

For other cases prior to the recent spate, see Annot., 7 A.L.R. 3d 891 (1966).

3. See note 212 *infra*.

4. One of the best of the recent articles on the problem was written by a state legislator. *See* D'Alemberte, *Journalists under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969).

5. *See, e.g.*, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re* Pappas, — Mass. —, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1971); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); People v. Dohrn, Crim. No. 69-3005 (Cir. Ct. Cook County, Ill., May 20, 1970); People v. Rios (Super. Ct. San Francisco County, Cal., July 15, 1970).

6. For a remarkably thoughtful and thorough discussion of the press subpoena problem, see Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970). Other recent commentary includes: Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667 (1971); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. CIV. LIB.—CIV. RIGHTS L. REV. 119 (1970); Comment, *The Newsman's Privilege: Protection of Confidential Associations and Private Communications*, 4 U. MICH. J. L. REF. 85 (1970); Comment, *Newsmen's Immunity Needs a Shot in the Arm*, 11 SANTA CLARA LAW. 56 (1970); Note, *The Right of the Press To Gather Information*, 71 COLUM. L. REV. 838 (1971); Recent Case, 84 HARV. L. REV. 1536 (1971).

7. The issue will come before the Court in Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re* Pappas, — Mass. —, 266 N.E.2d 297, *cert. granted*, 402 U.S. 942 (1971); Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App.), *cert. granted*, 402 U.S. 942 (1971).

8. The second article will discuss the common-law and statutory dimensions of the press-subpoena controversy. The third article will consider the constitutional question.

proceeding, however, it may be helpful to sketch briefly some of the dimensions of the controversy.

The three cases on the Court's docket all concern one variant of the press subpoena problem: a grand jury's effort to acquire from a reporter information about possible law violations commissed by his news sources. While this is currently the most common posture in which the issue presents itself, one must take cognisance of many other manifestations of the controversy before deciding what general principles, let alone detailed standards, ought to govern press subpoena disputes. Congressional committees, such as the panel that was looking into the CBS documentary *The Selling of the Pentagon*,[9] may wish to subpoena newsmen to scrutinise the accuracy and balance of certain reporting efforts. Criminal defendants have an explicit sixth amendment right to compel the attendance of witnesses in their favor; this right may at times conflict with the reporter's interest in honoring confidences with sources, such as police officers or prosecutors, who may have given the reporter information that would be helpful to the defense.[10] On occasion, information in the hands of newsmen might enable the police to prevent future crimes or to apprehend fugitive felons.[11] Some journalistic endeavors border on criminal activity, such as participation in acts of demonstrative vandalism[12] or receiving stolen documents.[13] As of the Supreme Court's recent decision in *Rosenbloom v. Metro-*

9. *See* N.Y. Times, June 25, 1971, at 71, col. 1.

10. In People v. Dohrn, Crim. No. 69-3005 (Cir. Ct. Cook County, Ill., May 20, 1970), this sixth amendment right was held in the particular circumstances of the case to be superseded by the newsman's first amendment right to a privilege. *See also* People v. Rios, No. 75129 (Super. Ct. San Francisco County, Cal., July 15, 1970).

11. This was the consideration put forth by the majority in State v. Knops, 49 Wis. 2d 647, 659, 183 N.W.2d 93, 99 (1971). The case concerned an attempt by a grand jury to secure the testimony of the editor of an underground newspaper which, after a bombing at the University of Wisconsin resulting in the death of one student, ran a story entitled "The Bombers Tell Why and What Next—Exclusive to Kaleidoscope." The editor refused to testify, first asserting his fifth amendment right against self-incrimination. The grand jury then granted him immunity, but he still declined to answer questions and was cited for contempt. 49 Wis. 2d at 650, 183 N.W.2d at 94. On appeal, the Wisconsin supreme court interpreted the first amendment to grant all journalists, including those of the underground press, a qualified privilege to protect sources. The court held, however, over one dissent, that in the particular circumstances of the case the incremental law enforcement gains to be realized by compelling Knops to testify outweighed the first amendment interest in newsgathering. 49 Wis. 2d at 658-59, 183 N.W.2d at 99. Knops spent several months in jail, and to this date has refused to answer the grand jury's questions. The bombing remains unsolved.

12. One night Michigan's celebrated "billboard bandits" invited two reporters along to cover one of their periodic efforts to improve the environment. A group of local residents surprised the group, and the newsmen were held for complicity in the crime. The charges were eventually dropped. *See, e.g.*, Detroit Free Press, April 28, 1971, at 1-A, col. 7.

13. *See* New York Times v. United States, 403 U.S. 713 (1971); Liberty Lobby v. Pearson, 390 F.2d 489 (D.C. Cir. 1968); Dodd v. Pearson, 279 F. Supp. 101 (D.D.C. 1968).

media, Inc.,[14] virtually all libel plaintiffs must carry the burden of proving with clear and convincing evidence that the defendant acted with reckless disregard for the truth, a well-nigh impossible task if the defendant is allowed to hide behind anonymous sources. These and other situations raise considerations that are not present in the cases that are currently before the Court, and that may call for a quite different reconciliation of the conflicting interests.

In addition to keeping in mind a number of factual variants, one should also view the problem from the broader perspective of evidence law. While constitutional doctrine has relied rather heavily on rules that exclude trustworthy evidence in the name of social values other than the search for truth,[15] evidence scholars have criticized this strategy.[16] Partly, this criticism is a result of the fact that these scholars tend to center their professional attention on, and consequently attach very high priority to, the quality of the fact-finding process.[17] Equally important, however, is their scepticism over whether exclusionary rules and privileges come even close to achieving the behavioral effects that are usually invoked to justify the evidentiary costs.[18] Have police officers been more respectful of the privacy of suspects as a result of *Mapp v. Ohio*?[19] Has a husband ever confided in his wife because of the husband-wife privilege? One cannot, it would seem, resolve the press subpoena controversy by mindlessly looking to "progressive" legal thought because, as with the cases concerning the privacy tort[20] and trial publicity,[21] the "progressive" trends are on a collision course.

14. 403 U.S. 29 (1971).

15. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Mapp. v. Ohio, 367 U.S. 643 (1961).

16. *See, e.g.*, 8 J. Wigmore, Evidence § 2184a n.1, at 31 (McNaughton rev. 1961). Happily for his peace of mind, Wigmore did not live to see *Mapp* and *Miranda*. He was deeply upset by their progenitors, however; his scathing parable of Titus and Flavius makes the current law-and-order literature seem tame by comparison:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.

Id. See also J. Maguire, Evidence of Guilt, § 5.02, at 176-79 (1959).

17. *See, e.g.*, C. McCormick, Evidence § 81, at 165, § 90, at 179-80 (1954); 8 J. Wigmore, *supra* note 16, § 2192, at 70-74.

18. *See, e.g.*, C. McCormick, *supra* note 17, §§ 90-91, at 179, 181-82, § 108, at 222; Morgan, *Foreword* to Model Code of Evidence at 22-31 (1942).

19. 367 U.S. 643 (1961). *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

20. Time, Inc. v. Hill, 385 U.S. 374 (1962) (expanding first amendment principles held to limit expansion of the privacy tort).

21. *E.g.*, Estes v. Texas, 381 U.S. 532 (1965) (expanding notions of due process for the accused held to supersede the news media's first amendment interest in televising trials).

The subpoena controversy ought also to be viewed in the context of developing free speech theory. Having spent more than a century in largely hortatory limbo,[22] the first amendment has had a surprisingly brief career—just over fifty years—as a meaningful legal concept.[23] And in that relatively short span of time, judicial and academic analysis has concentrated on the problems of advocacy and political belief.[24] Only recently have the courts made serious efforts to formulate free speech principles to govern disputes over emotive imagery,[25] falsehood,[26] and competing demands for the use of public and quasi-public land.[27] The press subpoena controversy, the dispute over the publishing of the Pentagon Papers,[28] and a recent landmark court of appeals decision recognizing a first amendment right to buy network time for political advertisements[29] all suggest that free speech analysis in the future may be increasingly concerned with the flow of information—with questions of access to sources of information[30]

22. *See, e.g.*, T. Emerson, D. Haber & N. Dorsen, Political and Civil Rights in the United States 35-60 (1967), and authorities cited therein. *See also* Fox v. Washington, 236 U.S. 273 (1915); Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1910); Patterson v. Colorado, 205 U.S. 454 (1903).

23. Apparently, the earliest judicial decision to give any meaningful protection to speech was Judge Learned Hand's district court holding in Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *revd. on other grounds*, 246 F. 24 (2d Cir. 1917). Justice Holmes' clear-and-present-danger test appeared two years later, Schenck v. United States, 249 U.S. 47 (1919), but it was not until Near v. Minnesota, 283 U.S. 697 (1931), that the Court reversed a state court judgment explicitly on first amendment grounds. *Cf.* Fiske v. Kansas, 274 U.S. 380 (1927). The first Supreme Court decision to strike down an act of Congress as repugnant to the first amendment came only six years ago. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

24. *See, e.g.*, the cases and articles compiled in W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 721-891 (3d ed. 1970).

25. *E.g.*, Cohen v. California, 403 U.S. 15 (1971); Stanley v. Georgia, 394 U.S. 557 (1969); Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966).

26. *E.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964).

27. *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Adderly v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

28. New York Times v. United States, 403 U.S. 713 (1971).

29. Business Executives' Move for Vietnam Peace v. FCC, 40 U.S.L.W. 2082 (D.C. Cir. Aug. 3, 1971).

30. *See, e.g.*, Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959); Kovach v. Maddux, 238 F. Supp. 835 (M.D. Tenn. 1965); Los Angeles Free Press v. City of Los Angeles, 9 Cal. App. 3d 448, 88 Cal. Rptr. 805 (1970); New York Post Corp. v. Moses, 25 Misc. 2d 826, 204 N.Y.S.2d 44 (Sup. Ct. 1960).

and to the channels of mass communication.[31] The press subpoena cases will challenge the Court either to fit this burgeoning set of issues into an existing conceptual framework or to devise new first amendment standards for resolving these information-flow disputes.

Modern developments in the journalism profession comprise still another background against which the subpoena issue should be examined. As the broadcast media have gradually assumed predominance in the provision of hot news, the print media have turned increasingly to in-depth, interpretive reporting.[32] This latter variety of news coverage depends heavily on "not for attribution" quotes, "off the record" background sessions, leads, and continuing relationships with sources.[33] The spectacular growth of the underground press has ushered in other important trends in the profession, including what might be termed "participant-observer" reporting, an approach that is particularly implicated in the subpoena controversy. Perhaps the most significant recent development in American journalism, however, is the pronounced disillusionment that many reporters have come to experience with regard to the nation's political leadership.[34] This feeling is not traceable solely to President Nixon's treatment of the press. Indeed, the disillusionment traces back to the Kennedy Administration's more subtle manipulation of the media and to the credibility gap of the Johnson years. Nor is the attitude limited to the young reporters whose naive idealism has been punctured. The "old pros," men who have covered the tough beats, who have "seen it all," and who used to cooperate willingly with law enforcement officials and investigatory bodies, now say they

31. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Chicago Joint Bd., Amal. Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970).

32. *See* C. MacDougall, Interpretative Reporting 13-18 (5th ed. 1968). This trend was confirmed in several personal interviews. *E.g.*, interviews with: Jack Mabley of Chicago Today, Aug. 6, 1971, Chicago; William Jones of the Chicago Tribune, Aug. 6, 1971, Chicago; Jim Hoge, Editor of the Chicago Sun-Times, Aug. 6, 1971, Chicago; Ray Brennan of the Chicago Sun-Times, Aug. 6, 1971, Chicago; Steve Roberts of the N.Y. Times, Aug. 9, 1971, Los Angeles; Peter Goldman, Senior Editor of Newsweek, July 8, 1971, New York; Theo Wilson of the N.Y. Daily News, May 13, 1971, New York; Jerry Tallmer of the N.Y. Post, May 14, 1971, New York. Some critics of the press contend, however, that this trend is not as rapid or as extensive as it should be. *See, e.g.*, J. Hohenberg, The News Media: A Journalist Looks at His Profession 34-35 (1968); Ways, *What's Wrong with News? It Isn't Enough*, Fortune, Oct. 1969, at 110.

33. This point was made repeatedly in the interviews cited in note 32 *supra*.

34. This feeling of disillusionment is apparently very widespread. The attitude was conveyed in a particularly poignant fashion in interviews with: Sander Vanocur of Public Broadcasting Service, July 8, 1971, New York; Jim Hoge, *supra* note 32; Joseph Lelyveld of the N.Y. Times, May 14, 1971, New York; Jerry Tallmer, *supra* note 32; Hal Bruno, News Editor of Newsweek, May 13, 1971, New York; Wallace Turner of the N.Y. Times, Aug. 10-11, 1971, San Francisco.

are so alienated that they feel no obligation to assist the processes of government.[35] The press subpoena controversy is in the courts today largely because the sensitivity to each other's needs that used to characterize government-press relations is now virtually nonexistent.

II. Findings and Impressions

One component of every legal decision—whether it be the decision to draft or to vote for a statute, to crystallize a common-law concept, or to interpret a statute or a constitution in one way rather than another—is a set of factual premises. Many, if not most, of the empirical premises that guide legal decision-making are initially formulated by a most unsystematic and impressionistic process. What is worse, these premises are seldom tested in operation. Indeed, probably the greatest single shortcoming of American law as a decision-making process is its failure to institute any sort of systematic auditing procedure. At a time when other disciplines are experiencing a virtual knowledge explosion, legal decision-makers and pundits continue to rely almost exclusively on "the lessons of experience" and intuitive "insights."

In preparation for examining the statutory, common-law, and constitutional dimensions of the press subpoena controversy, I have sought to achieve as comprehensive and systematic an understanding of the empirical aspects of the dispute as time and resources would permit. I present my empirical findings and impressions separately, before proceeding to incorporate them in an analysis of the legal questions, for two reasons. First, I hope to help readers who are unwilling to accept my empirical premises to know the exact points on which we disagree and the reasons for our disagreement. Too often discourse on legal issues is plagued by a failure to separate the empirical and normative dimensions of the inquiry and a concomitant failure to subject empirical premises to a rigorous standard of justification. Second, there may be some readers who may find my empirical conclusions persuasive but who cannot accept the legal conclusions that I draw therefrom. In presenting my empirical findings separately, I hope to aid these readers in formulating their own conclusions on the legal questions.

A. *Research Methods*

My conclusions are a composite derived essentially from three separate but interrelated empirical projects. First, I conducted

35. Interviews with: Hal Bruno, *supra* note 34; Jerry Tallmer, *supra* note 32; Ray Brennan, *supra* note 32.

personal interviews with 47 reporters and editors in New York City, Washington, D.C., Chicago, Detroit, Los Angeles, San Francisco, and Denver. Most of the interviews lasted about one hour, although some lasted much longer and a few were shorter. The subjects were chosen impressionistically on the basis of their expressed willingness to cooperate, their achievements in the profession, the kind of reporting or editing they do, their importance in terms of the number of readers or viewers they reach, and their familiarity with the subpoena problem. Frequently one interviewee would recommend other newsmen with whom I should try to speak, and I pursued these leads whenever possible. I followed no set pattern in the interviews, but rather I tried to explore the nuances and details of whatever aspects of the problem the interviewee seemed most interested in and informed about. On some occasions I studied questionnaire responses that the interviewee had given to a qualitative survey that I had conducted and then in the personal interview I pressed for reasons, sometimes in a cross-examining manner. I also used these personal interviews to explore hypotheses that were forming in my mind, including some that were developing as a result of responses to a quantitative survey of newsmen I was conducting at the same time. Throughout this interviewing phase of the empirical study, my goal was depth rather than breadth; I sought to gain a "feel" for some of the empirical aspects of the problem that could not be reduced to quantitative measures.

Second, Dean Richard Baker of the Columbia Graduate School of Journalism and I conducted a mail questionnaire survey of 67 reporters whom we expected, on the basis of direct information we had or the kind of reporting they do, to be especially familiar with the subpoena problem. The questionnaire was designed to elicit "qualitative" rather than "quantitative" information. We invited the respondents to tell about their subpoena experiences and to express their opinions about the controversy in their own words.

Third, Dean Baker and I conducted a quantitative survey. The questionnaire sought responses that could be coded and tabulated and thus it necessarily failed to measure some of the possibly important subtleties and nuances in the experiences and opinions of the newsmen surveyed. Rather than choosing a smaller, random sample from which one might generalize about a larger population, we decided to measure the responses of a large nonrandom population with no intention of generalizing statistically beyond the population. Two major considerations influenced this decision. First, for legal purposes the most important population need not be so large

(*e.g.*, all voters, all journalists, all blacks) that it can be measured only by random sampling techniques. The more appropriate population, in fact, may be of a size capable of being completely surveyed. If, for example, only 100 highly specialized reporters were at all affected by the subpoena threat, the quantitative information one might obtain from surveying this relatively small population completely might be more valuable than the information that might result from studying the entire journalism profession by means of a random sample. Second, even if the latter course were desirable, we were sceptical whether we could devise a sample that would qualify as "random," as careful social scientists use the term, and that would permit valid generalizations about a population larger than that surveyed. For one thing, definitional complications are not insignificant in this age of stringers, free-lancers, and the underground press. More important, because of the dearth of previous survey research on the subpoena problem,[36] we could not—as political pollsters do—know with confidence what variables to control for in selecting the sample. Thus, the sample was not intended to be random. It was, however, chosen with care and with an eye to achieving the quantitative measures that would be most relevant to the analysis of the legal questions.

In deciding upon the population to be surveyed, we adopted two selection principles. We sought, first, to include reporters from a wide range of media, and, second, to include primarily those reporters who reach a comparatively large number of readers, viewers, or listeners. In surveying the daily press, we limited our population to the 208 newspapers with a minimum circulation of 50,000. We sent each of these newspapers one questionnaire for every 50,000 persons in its circulation, as reported in the 1971 Editor and Publisher Yearbook. We chose the recipients of the questionnaire by selecting a recent edition of the paper; beginning with page one and proceeding until the paper's quota was reached, we sent a questionnaire to each journalist (including wire service reporters) who had a domestic by-line, photo credit, or column in the paper that day. For the weekly news magazines, we decided because of definitional hazards to limit the survey to *Newsweek*, *Time* and *United States News and World Report*. We sent a questionnaire to every

36. The only previous survey is reported in Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 57-61 (1969). The authors asked 37 daily newspaper editors, apparently selected on an impressionistic basis, the following question: "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." *Id.* at 61.

domestic correspondent employed by these three magazines. The underground press posed more of a problem: we anticipated a sparse response and we wanted a large enough population to enable us to draw some comparisons with reporters from the establishment media. We sent one questionnaire each to the editors of 95 underground newspapers, which we selected impressionistically on the basis of reputation for importance and geographic dispersity[37] from a larger list supplied by the Liberation News Service. For the national television networks, we were able to obtain personnel lists from two of the three networks, the National Broadcasting Company (NBC) and the American Broadcasting Company (ABC), and we chose newsmen randomly from these lists. For local television, we sent questionnaires to all the news directors from the 21 leading market areas whose names were listed in the 1971 Broadcasting Yearbook. For radio we followed the same pattern: all news directors listed from the 21 leading market areas. Finally, we included free-lance journalists and those who write for magazines other than the three major newsweeklies by taking every other name from the membership list of the Magazine Writers Association.

Altogether, 1,470 questionnaires were sent out with a cover letter that stressed the importance of objectivity and made no mention of the pending subpoena litigation. Two follow-up letters were sent to those who did not return the questionnaire on the first round. A total of 975 questionnaires (66.3%) were eventually returned. The distribution by type of medium was: daily press, 528 (53.2%); newsweekly, 132 (13.3%); underground press, 47 (4.7%); network television, 51 (5.1%); local television and radio, 130 (13.1%); free-lance and other magazine, 103 (10.4%). The distribution by years of experience as a full-time reporter was: less than one year, 36 (4.2%); 1-5 years, 206 (23.9%); 6-10 years, 197 (22.9%); 11-20 years, 224 (26.0%); more than 20 years, 199 (23.1%). Each respondent was asked to specify the state in which he does most of his work; 46 states and the District of Columbia were represented in the returned questionnaires.[38] One hundred and forty-eight (16.8%) of the respondents considered themselves very well qualified to answer the questionnaire; 198 (22.5%) fairly well qualified; 240 (27.3%) somewhat qualified; and 293 (33.3%) considered themselves not well qualified.

This population of respondents, having been consciously selected by me in the first place and then having been self-selected by those who chose to fill out the questionnaire, is necessarily "biased" in some directions. The claim can fairly be made, nonetheless, that this population represents one extremely important segment of the journalism profession, and that the average consumer of news receives a significant portion of his daily and weekly fare from the newsmen who comprise this survey.

Finally, I wish to emphasize the point that the quantitative survey is only one of several sources on which my ultimate empirical conclusions are based. Quantitative information can be extremely valuable—but only if it is used with care. It must be remembered that a questionnaire measures only one kind of response, at one level of consciousness, and after only a limited amount of thought by the respondent. The way a person checks off blanks on a questionnaire tells something about his experiences and judgments, but it does not necessarily tell how he would respond to a question in a personal interview, let alone how he would react in a real-life situation, particularly a crisis. Relying on the personal interviews and the separate qualitative survey, I have tried to place the quantitative information in perspective.

B. *The Nature of Reporter-Source Relationships*

Confidential relationships between reporters and sources vary greatly, but a few patterns can be discerned.

Most people find exciting the prospect of press coverage of their activities, their information, or their ideas, and they cooperate with reporters as completely as they can. This generalization is less true for politicians on the make, cautious bureaucrats, and severely disaffected members of the society, but even these potential news sources seem to display at worst an approach-avoidance attitude. In fact, a great deal of information comes to newsmen unsolicited. Some top-flight investigative reporters, for example, say that they get as many important leads from unsolicited letters and phone calls as they do from their own digging after information.[39] Newsmen who specialize in daily coverage of minority groups receive many more unsolic-

37. This selection was done by Arthur Felson, our research associate, who is more familiar with the underground press than are Dean Baker and I.

38. The breakdown by state was: Alabama 8; Alaska 0; Arizona 8; Arkansas 0; California 88; Colorado 1; Connecticut 10; Delaware 2; District of Columbia 106; Florida 29; Georgia 11; Hawaii 0; Idaho 13; Illinois 55; Indiana 21; Iowa 7; Kansas 4; Kentucky 9; Louisiana 8; Maine 3; Maryland 7; Massachusetts 37; Michigan 39; Minnesota 18; Mississippi 10; Missouri 20; Montana 1; Nebraska 5; Nevada 2; New Hampshire 4; New Jersey 23; New Mexico 4; New York 165; North Carolina 16; North Dakota 1; Ohio 35; Oklahoma 16; Oregon 4; Pennsylvania 39; Rhode Island 1; South Carolina 3; South Dakota 1; Tennessee 10; Texas 37; Utah 2; Vermont 1; Virginia 5; Washington 28; West Virginia 2; Wisconsin 14; Wyoming 0.

39. *E.g.*, interviews with: William Jones, *supra* note 32; Bill Farr, formerly of the Los Angeles Herald Examiner, Oct. 9, 1971, Los Angeles.

ited tips than they can possibly follow up.[40] Reporting of radical activities, on the other hand, appears to rely less on unsolicited information.[41]

When reporters are seeking to establish contact with particular sources, elaborate rituals of introduction are seldom necessary except with political and entertainment celebrities.[42] Personal recommendations and name-dropping come in handy on occasion, but these devices seem to be relied upon much less than one might suppose. Blacks tend to be suspicious of white reporters and radicals tend to distrust the establishment press, but reporters with the basic personal credential of blackness or a counterculture life style seem to need little else to establish preliminary contact with these sources.[43] There are, of course, exceptional situations. On such occasions, newsmen will resort to any number of devices to get information from sources: for example, securing a personal recommendation from another reporter who has won the trust of the source;[44] giving the source detailed assurances of confidentiality, sometimes to the extent of promising to go to jail if necessary;[45] paying the source[46]—one instance of a $5,000 payoff was related to me in an interview;[47] offering to trade information with the source;[48] or offering not to print information that might be damaging to the source in return for other information or leads. For the most part, however, the acquisition of sources is more a function of personality than of any special techniques or contacts.[49]

Getting an interview is one thing; gaining an accurate and comprehensive understanding of a person, a group, or a news event is quite another matter. It is in this latter pursuit that some reporters succeed and many fail.[50] Personal recommendations, inside information, and mutual acquaintances can be very important in getting a source to relax and to speak expansively, or in persuading a group to allow its operations to be observed in an unstructured fashion.[51] But even more important for these purposes is the reporter's ability to inspire in his sources a feeling of confidence that he will understand the information he receives and will report it accurately.[52] In covering some of the polarized elements in society—radicals, minority groups, police—it is virtually impossible for the reporter to establish this feeling of confidence unless the source is convinced that the reporter is actually "on his side."[53] This attitude, characterized by the slogan "if you are not for me, you are against me," is prevalent today among many news sources. And other sources who do not put the matter in such either/or terms demand at a minimum that the reporter maintain an independence and an autonomy that may require him to avoid any involvement whatsoever with "the other side."[54]

In maintaining this posture, reporters and editors face a dilemma. It is important for the reporter to identify with the source in order to reduce the feelings of self-consciousness that most sources experience when speaking with the press. Unless this self-consciousness is overcome, the newsman, unable to report accurately and perceptively on daily routines, may be reduced to reporting a series of "psuedo-events."[55] But identifying with sources also creates substantial risks. Reporters can get caught up in a gossip syndrome as a result of which they become more concerned with getting the inside story for themselves than with getting as much of the story as possible across to the reader.[56] Many editors and reporters feel that reporters

40. Interviews with: Steve Duncan of the N.Y. Daily News, May 13, 1971, New York; Meremeil Rodriquez of the N.Y. Daily News, May 13, 1971, New York.

41. Interview with John Kifner of the N.Y. Times, Aug. 13, 1971, Boulder, Colorado.

42. Interviews with: Karston Prager of TIME, Aug. 10, 1971, San Francisco; Wallace Turner, *supra* note 34; Earl Caldwell of the N.Y. Times, Aug. 12, 1971, San Francisco; Judy Kinnard of the N.Y. Times, Aug. 9, 1971, Los Angeles.

43. *Id.*

44. Interviews with: Steve Duncan, *supra* note 40; Earl Caldwell, *supra* note 42.

45. Interview with David Burnham of the N.Y. Times, May 14, 1971, New York.

46. Interviews with: Tom Powers of the Chicago Tribune, Aug. 6, 1971, Chicago; William Jones, *supra* note 32.

47. Interview with Tom Powers, *supra* note 46.

48. Interviews with: Jack Mabley, *supra* note 32; William Jones, *supra* note 32, Helen Mead of CBS, July 8, 1971, New York.

49. Interviews with: Wallace Turner, *supra* note 34; Karston Prager, *supra* note 42.

50. Wallace Turner, chief of the N.Y. Times San Francisco bureau, made the point to me most dramatically. He gave me a lengthy feature story that he had written on the Black Panthers before Earl Caldwell joined the bureau to specialize in Panther coverage. The story, which included an in-depth interview with Eldridge Cleaver, seemed to present a rather detailed and insightful analysis of the Panthers. "It's not worth a damn," Turner told me after I had read the story. He noted that he had to print essentially what the Panther leaders told him, that he was not able to get to the rank-and-file members of the party or to observe the Panthers' daily routine. In short, he could not verify the information that was given him, and his analysis of trends and tensions was of necessity based almost exclusively on what the leaders told him. Interview, *supra* note 34.

51. Interviews with: Earl Caldwell, *supra* note 42; Steve Duncan, *supra* note 40.

52. Interviews with: John Kifner, *supra* note 41; Ron Einstoss of the Los Angeles Times, Aug. 9, 1971, Los Angeles; Earl Caldwell, *supra* note 42; Steve Roberts, *supra* note 32.

53. Interviews with: Earl Caldwell, *supra* note 42; Diane Camper of NEWSWEEK, Aug. 12, 1971, San Francisco; John Kifner, *supra* note 41.

54. Interviews with: William Cook of NEWSWEEK, Aug. 12, 1971, San Francisco; Steve Roberts, *supra* note 32; Karston Prager, *supra* note 42; John Kifner, *supra* note 41.

55. The term is Daniel Boorstin's. *See generally* THE IMAGE (1960).

56. Interviews with: Joseph Lelyveld, *supra* note 34; David Burnham, *supra* note 45; Theo Wilson, *supra* note 32; Jerry Tallmer, *supra* note 32.

could get a great deal more information on the record if they pressed their sources more aggressively and were less concerned about really being on the "inside."[57] Regular confidential sources can also co-opt a reporter, particularly when the reporter's career is interrelated with the source's career.[58] The danger of co-optation is probably greatest in reporting on politicians, but it is not unknown in covering radicals and minority groups.[59]

Reporters cope with this dilemma in different ways. Every newsman whom I questioned on the point said that he consciously strives to keep his role as a reporter clearly defined. According to these journalists, it is important for sources to realize that although a newsman's sympathies may lie with his sources, his primary responsibility is to his readers. This role definition sometimes takes the form of a reluctance on the part of the reporter to offer information or advice to sources,[60] although it is not uncommon for newsmen to counsel inexperienced sources on public relations tactics such as the timing of press releases[61] and investigative reporters sometimes plot strategy with bureaucrats who have decided to "blow the whistle."[62] Another example of the sensitivity to role is the fact that some reporters who have distinguished themselves in acquiring sources in radical movements say they would not put themselves in a position to learn certain highly sensitive pieces of information that could not be related to readers.[63] On the other hand, reporters will sometimes take it upon themselves to look after an inexperienced source's best interests even when such concern might conflict with the reporter's professional endeavors. It is not unheard of for a newsman, particularly one who identifies strongly with his sources, to advise a source that he probably would not want his name to be used.[64] In writing their stories reporters will sometimes omit details that they believe would unduly

57. Interviews with: Jason McManus of TIME, July 7, 1971, New York; Ronald Kriss of TIME, July 7, 1971, New York; Joseph Lelyveld, *supra* note 34.

58. Interviews with: Sander Vanocur, *supra* note 34; David Burnham, *supra* note 45. This phenomenon is also described in G. TALESE, THE KINGDOM AND THE POWER 234 (Bantam ed. 1970).

59. Interview with Steve Roberts, *supra* note 32.

60. Interviews with: Meremeil Rodriquez, *supra* note 40; John Kifner, *supra* note 41.

61. Interview with John Kifner, *supra* note 41.

62. Interview with William Jones, *supra* note 32.

63. Interviews with: J. Anthony Lukas of the N.Y. Times, July 8, 1971, New York; Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41.

64. Interviews with: Elisabeth Coleman of NEWSWEEK, Aug. 12, 1971, San Francisco; Diane Camper, *supra* note 55.

harm a source even though the source himself, out of recklessness or naïveté, might not mind if the information were printed.[65]

No matter how these problems of role definition are resolved, "confidentiality" in these relationships often takes the form of an unspoken trust that the reporter will treat the information with care and will know what to use and what not to use. Frequently there is not an explicit agreement about what is on and off the record.[66] In fact, radical and militant sources are most often concerned not with keeping sensitive information out of stories, but rather with making sure that the information is presented in its proper context and in enough detail so that a distorted or oversimplified impression is not conveyed.[67]

With relatively sophisticated sources such as politicians and government bureaucrats, on the other hand, the confidentiality tends to be more explicit.[68] On his own initiative the source may preface a remark with "You can't use this, but . . . ." or "You can quote this, but don't attribute it." Or the reporter may cajole a reticent source by volunteering to keep information off the record. A common technique is for a reporter to put the source at ease by initiating an interview on an off-the-record basis and then to press at the conclusion of the interview, or even days later, for permission to use the material.[69] Correspondents for newsweeklies in particular find themselves engaged in this renegotiation after the New York writers and editors decide how they want the story to run.[70] Frequently sources who offer material off the record can subsequently be persuaded to allow the information to be printed as long as it is not attributed to them.

In a few situations confidentiality will take still another form: the identity of the source will remain unknown even to the reporter. Some investigative reporters have gotten big stories from unsolicited,

65. Interview with Peter Goldman, *supra* note 32.

66. Interviews with: J. Anthony Lukas, *supra* note 63; John Kifner, *supra* note 41; Earl Caldwell, *supra* note 42; Ron Einston, *supra* note 52.

67. Interviews with: Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41.

68. Interview with Floyd Kalber of NBC, Aug. 6, 1971, Chicago. As radicals and militants become more experienced and sophisticated in dealing with the press, they tend to demand more explicit understandings concerning the details of confidentiality. One reporter attributes this phenomenon partly to role playing in emulation of the "Washington syndrome." Interview with Martin Kasindorf of NEWSWEEK, Aug. 9, 1971, Los Angeles.

69. Interviews with: Martin Kasindorf, *supra* note 68; Karston Prager, *supra* note 42.

70. *Id.*

anonymous sources.[71] The mystery man may, for example, leave revealing documents in a bus station locker, or he may phone regularly at an appointed hour. Newsmen are very reluctant to use these sources in the absence of independent verification of their information, but the phenomenon of the totally anonymous source is not unknown.

For most confidential relationships, even those in which the terms are carefully negotiated, the reporter's secrecy obligation does not preclude him from sharing the information with his editors and fellow reporters.[72] There are some instances in which the reporter will feel bound to keep the information to himself, but they are rare. A very important use of confidential information is in persuading editors to run the story.[73] Only with his most trusted reporters will an editor have sufficient faith in the accuracy and balance of a story when he knows he is being kept partly in the dark. Although the rules are not followed to the letter, correspondents for *Newsweek* and *Time* are required to include in the files they submit to New York all the information they get off the record and the identities of all their sources for not-for-attribution quotes.[74] Material obtained in confidence is also shared among competitors; a common practice, especially in trial reporting, is for reporters from different newspapers to pool their confidential information.[75]

Sources may "dry up" for any number of reasons. The most common cause is the source's disillusionment with the way the reporter is writing his stories.[76] Although few sources expect stories to be written from their own point of view, perceptions are so determined by values that a reporter's composite assessment of what happened will often be considered by the source to be outside the range within which reasonable men might differ. And, of course, some stories *are* badly botched in ways that can be damaging to the source.

This sensitivity on the part of sources can have some interesting effects on the competition for stories. Reporters for the newsweeklies sometimes are able to placate angry sources by placing all the blame

71. Interviews with: Jack Mabley, *supra* note 32; William Jones, *supra* note 32; Bill Farr, *supra* note 39.

72. Interviews with: Theo Wilson, *supra* note 32; Jack Mabley, *supra* note 32; Hal Bruno, *supra* note 34.

73. David Burnham, the New York Times reporter who did the exposé last year on graft in the New York Police Department, told me that his editors were reluctant to run the story until he brought some of his police sources to the Times building for a lengthy, off-the-record conference with the editors. Interview, *supra* note 45.

74. Interviews with: Hal Bruno, *supra* note 34; Jason McManus, *supra* note 57.

75. Interview with Theo Wilson, *supra* note 32.

76. Interviews with: John Kifner, *supra* note 41; Steve Roberts, *supra* note 32; Earl Caldwell, *supra* note 42; Hal Bruno, *supra* note 34.

on the writers and editors in New York,[77] an excuse that is not available to newspaper reporters with by-lines. Earl Caldwell of the *New York Times* says that in covering the Black Panthers in the Bay Area he has an easier time than do reporters from the *San Francisco Chronicle* because the Panthers do not regularly read the *Times*.[78] A reporter for an establishment newspaper once appeared at an SDS convention with a scrapbook of his sympathetic stories on radical groups and found this to be a remarkably effective device for acquiring sources.[79]

Given the phenomenon of value-laden perceptions and the long-term value of some sources, there can be a great deal of pressure on a reporter to write favorably about regular sources. When coupled with the tendency of reporters to identify with their sources, there exists the possibility that fairness as well as neutrality may be sacrificed. All newsmen are aware of this danger, and most fight very hard to resist it.[80] Few reporters will admit to tempering stories or omitting even marginal information that might greatly annoy a source. One editor told me that he thinks he has probably erred too often on the side of running the story and risking the source.[81]

There appears to be one other common pattern in source relationships. Threats by sources to cut the reporter off are made far more frequently than they are carried out.[82] Particularly for those local and national media that are important to the source's endeavors, disenchantment with the reporter has a way of subsiding after a short period of time. Some reporters attribute this high source-return rate to something more than the need for publicity. They say that most sources will quietly acknowledge the "inherent fairness" of a critical story, even while they go through the motions of ranting and raving.[83] If the reporter is cut off, it is frequently only temporary. More often than not, the prodigal son returns.

C. *The Uses of Confidential Sources*

Confidential news sources are useful to reporters in a number of ways. Traditionally, the most significant use has been for not-for-

77. Interviews with: Jason McManus, *supra* note 57; Karston Prager, *supra* note 42.

78. Interview, *supra* note 42.

79. The reporter was Jack Nelson of the Los Angeles Times. The incident was related to me by John Kifner. Interview, *supra* note 41.

80. Interviews with: Meremeil Rodriques, *supra* note 40; Steve Roberts, *supra* note 32.

81. Interview with Hal Bruno, *supra* note 34.

82. Interviews with: Steve Roberts, *supra* note 32; Martin Kasindorf, *supra* note 68.

83. *Id.*

attribution quotations, which convey information or opinions to the reader that presumably would not be available for public consumption if the source had to be identified. Other uses are less obvious but, according to some respected newsmen, even more important for quality reporting. Information received in confidence is regularly used to verify printable items received from other sources on the record.[84] Off-the-record information is also important in deciding what emphasis to give certain printable facts in writing up a story;[85] in determining what stories to cover with what commitment of resources;[86] in persuading editors to run a particular story or to give it a certain prominence;[87] and in assessing for the reader the significance of recent developments and the alternatives and probabilities for the future.[88] Confidential information is also helpful to journalists in eliciting on-the-record information from other sources. Confidential tips often lead reporters to these other sources;[89] newsmen sometimes get reluctant sources to talk either by establishing a rapport by means of name-dropping or fact-dropping, or else by convincing the source that the cat is already out of the bag ("I have learned *X*, can you verify it?" or "When will *X* be announced?").[90] On the other hand, most editorial writers and columnists appear to rely very little, if at all, on information that comes from confidential sources.[91]

The extent of reliance on confidential sources cannot be quantified with any degree of precision, but the survey results provide a rough indication. Tables I and II show the estimates given by the respondents as to what percentage of their stories depend on confidential sources. By assigning to each response the midpoint within the range designated,[92] one can approximate from these data that the

84. Interviews with: Earl Caldwell, *supra* note 42; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41; Ron Einston, *supra* note 52; Edwin Bolwell of TIME, July 7, 1971, New York; Frank Maier of NEWSWEEK, Aug. 6, 1971, Chicago.

85. Interviews with: Joseph Lelyveld, *supra* note 34; Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41.

86. Interviews with: Ronald Kriss, *supra* note 57; Hal Bruno, *supra* note 34; Steve Duncan, *supra* note 40; Tom Powers, *supra* note 46.

87. Interviews with: David Burnham, *supra* note 45; Theo Wilson, *supra* note 32.

88. Interviews with: Hal Bruno, *supra* note 34; Earl Caldwell, *supra* note 42; Peter Goldman, *supra* note 32; Wallace Turner, *supra* note 34.

89. Interviews with: Meremell Rodriquez, *supra* note 40; William Jones, *supra* note 32; Tom Powers, *supra* note 46; Steve Duncan, *supra* note 40.

90. Interviews with: Sander Vanocur, *supra* note 34; Helen Moad, *supra* note 48; Ronald Kriss, *supra* note 57; Edwin Bolwell, *supra* note 84.

91. Interviews with: Leonard Lyons of the N.Y. Post, May 15, 1971, New York; Jack Mabley, *supra* note 32.

92. Thus, all respondents who checked 0-5% are assigned the figure 2.5%, all who checked 6-10% are assigned 8%, all who checked 11-25% are assigned 18%, and so on. The percentages are then averaged. *See* H. BLALOCK, SOCIAL STATISTICS 50-55 (1960).

TABLE I

"Approximately what percentage of your stories depend (either for direct quotation or information, or for leads or background) on explicit or implied understandings of confidentiality with sources who have helped you on at least two different occasions?"

Percentage of stories	Responses	
	Number	(Per Cent)
0-5%	256	(26.3%)
6-10%	178	(18.3%)
11-25%	188	(19.3%)
26-50%	134	(13.7%)
51-75%	73	(7.5%)
76-100%	49	(5.0%)
No answer	97	(9.9%)
	975	

TABLE II

"Approximately what percentage of your stories depend (either for direct quotation or information, or for leads or background) on explicit or implied understandings of confidentiality with sources who have never helped you on a story before?"

Percentage of stories	Responses	
	Number	(Per Cent)
0-5%	426	(43.7%)
6-10%	211	(21.6%)
11-25%	131	(13.4%)
26-50%	66	(6.8%)
51-75%	30	(3.0%)
76-100%	14	(1.4%)
No answer	97	(9.9%)
	975	

average newsman in the population surveyed relies on "regular" confidential sources in 22.2% of his stories and on first-time confidential sources in 12.2% of his stories. One can approximate further that, depending on the overlap—*i.e.*, the extent to which the first-time source stories are the same stories that involve regular sources—the average member of the population relies on one or the other kind of confidential source in anywhere from 22.2% to 34.4% of his stories. One should not, however, draw any conclusion from these data regarding the relative importance of regular and first-time sources. Many reporters whom I interviewed said that while more of their stories depend on regular sources, their most important stories tend to come from first-time sources and that such stories often require the use of many different sources.[93]

93. Interviews with: William Jones, *supra* note 32; Jack Mabley, *supra* note 32; Tom Powers, *supra* note 46.

Using the same midpoint calculation,[94] Table III shows the distribution of reliance on confidential sources according to years of experience as a full-time reporter. The heavier reliance on regular

TABLE III
EXPERIENCE: RELIANCE ON CONFIDENTIAL SOURCES

Years of experience as a full-time reporter	Number of respondents[95]	Percentage of stories that depend on "regular" confidential sources	Percentage of stories that depend on first-time confidential sources
Less than 1	94	13.3	12.7
1-5	206	18.4	11.1
6-10	196	21.6	13.9
11-20	222	24.7	11.6
More than 20	193	25.8	

confidential sources that appears to characterize the more experienced reporters[96] might suggest that the acquisition of regular sources takes both time and a certain skill that comes from experience. The heavier reliance can also be explained in part by the fact that regular sources are more important in regular beats and reporters tend to specialize more as they become more experienced. On the basis of the personal interviews I conducted, however, I am persuaded that a third explanation is probably the most important: younger reporters believe that there has been far too much reliance in the past on regular sources, off-the-record briefings, and blind quotes.[97] It is easy for a reporter to be "taken in" by his sources—"taken in" anywhere from believing and printing lies, to tempering stories so as to avoid alienating a valuable source, to perceiving events much as the source does. Many of the young newsmen I interviewed,[98] and some of the more experienced reporters as well,[99] are now deeply suspicious of all confidential information. They say, for example, that sources are more

94. *See* note 92 *supra*.

95. Some respondents failed to answer one or more of the three questions included in this Table. Only those respondents who answered all three questions are represented. The total is thus less than the 975 who returned the questionnaire.

96. Not only do the reporters who might be considered "experienced" rely more on regular sources than do reporters who might be considered "inexperienced," but also even relatively experienced reporters tend to rely more on such sources the more years of experience they have.

97. Interviews with: Steve Roberts, *supra* note 32; Joseph Lelyveld, *supra* note 34; David Burnham, *supra* note 45; Jason McManus, *supra* note 57.

98. *Id.*

99. Interviews with: Sander Vanocur, *supra* note 34; Ray Brennan, *supra* note 32; Wallace Turner, *supra* note 34; Edwin Bolwell, *supra* note 84.

willing to lie in off-the-record or not-for-attribution statements because their lies will not be exposed via the news media to those who know differently.[100] I. F. Stone, who makes a point of not accepting off-the-record information, was repeatedly cited as the model for this more suspicious group of journalists. Of course, the need to rely on confidential sources depends on several factors, including deadline pressures, the type of beat, and the type of news medium. But there is a sound basis for the generalization that the younger reporters—who incidentally, are considered by virtually everyone in the profession to be, on the whole, far superior to any previous generation of journalists[101]—tend to rely less on regular confidential sources. As Table III suggests, however, this disdain among younger reporters for confidential-source relationships seems not to carry over to first-time sources, who are generally less experienced and are considered to be less manipulative.[102]

Some news media rely more than others on confidential sources. Table IV presents a breakdown of source reliance in these terms. The

TABLE IV
SOURCE RELIANCE: MEDIUM

Type of news medium	Number of respondents[103]	Percentage of stories that depend on "regular" confidential sources	Percentage of stories that depend on first-time confidential sources
Daily newspapers	455	22.6	11.6
Underground newspapers	55	23.7	15.9
National network television	48	25.4	12.0
Local radio and television	119	13.4	6.7
Wire services	49	18.3	6.1
Newsweeklies	124	32.9	17.6
Other magazines and free-lance	97	18.5	18.0

most interesting statistic here, the heavy reliance by newsweeklies on regular confidential sources,[104] is all the more striking when it is

100. *Id.*

101. Without exception, the journalists whom I interviewed, both old and young, expressed the opinion that the standards of the profession are improving at a rapid rate because of the influx of a vastly more talented and committed generation of new reporters. *E.g.*, interviews with: Sander Vanocur, *supra* note 34; Ray Brennan, *supra* note 32; Jack Mabley, *supra* note 32; Jason McManus, *supra* note 57.

102. Interviews with: Steve Roberts, *supra* note 32; Elisabeth Coleman, *supra* note 61; Karston Prager, *supra* note 42; Diane Camper, *supra* note 53.

103. The figures include only those respondents who answered all three questions. *See* note 95 *supra*.

104. We studied subpopulations based on experience, type of medium, and type

considered that the newsweekly correspondents tend not to cover regular beats.[105] In interviews with newsweekly editors and reporters, the reason most often cited for this dependence on regular confidential sources is the importance of such sources for the kind of interpretive journalism that characterizes the newsweeklies.[106] Another reason is that the newsweeklies' tripartite division of labor—reporter, writer, editor—necessitates the systematic filing of confidential information if writers and editors in New York are to bring to their work the same "feel" for the situation that a newspaper reporter who is on the street has when writing up his stories.[107] Some newsweekly editors, however, admit that there is probably too much reliance on confidential information, particularly on blind quotes.[108]

Another datum that seems to stand out from Table IV is the infrequent reliance on confidential sources by the local broadcast media.[109] Again, this quantitative measure is consistent with the impressions I formed from the personal interviews.[110] For "hot," "hard" news, the importance of confidential sources lies not so much in getting information that can be passed on to the public as in assessing the accuracy and importance of information that is received from nonconfidential sources. Local television and radio stations have such small staffs (with virtually no regular beats) and are under such deadline pressures that this assessment is carried out only in a most unsystematic fashion.[111] Table IV also indicates that wire-service reporters rely relatively little on confidential sources. I did not personally interview any wire-service reporters, but my distinct impression is that they too work under such deadline pressure that they have little opportunity to engage in the kinds of verification efforts for which confidential sources are so important. According to Table IV, free-lancers, who presumably spend more than the average amount of time on verification, rely less than do most reporters on regular confidential sources but more than any other category of reporters on first-time sources. If one attributes the low reliance on regular sources to the disparate subject matter of their stories, the responses of the free-lancers would seem likewise to support the hypothesis that reliance on confidential sources is closely linked to the verification function.

Table V shows the distribution of source reliance according to type of reporting beat. The heavy dependence of government reporters on regular confidential sources is a well-known and often-

of beat, and no single group relies on regular confidential sources as much as does the group consisting of all newsweekly correspondents.

105. Interviews with: Frank Maier, *supra* note 84; Elizabeth Coleman, *supra* note 64; Karston Prager, *supra* note 42.

106. Interviews with: Hal Bruno, *supra* note 34; Peter Goldman, *supra* note 32; Jason McManus, *supra* note 57.

107. Interviews with: Karston Prager, *supra* note 42; Hal Bruno, *supra* note 34; Peter Goldman, *supra* note 32.

108. Interviews with: Jason McManus, *supra* note 57; Ronald Kriss, *supra* note 57.

109. Compare this with the higher-than-average reliance on confidential sources by the national networks, which have larger and more specialized staffs and tend to produce more features, documentaries, and other types of in-depth news reports.

110. Interviews with: Floyd Kalber, *supra* note 68; Joe Young of WXYZ Detroit, Sept. 24, 1971, Detroit.

111. Interviews with: Joe Young, *supra* note 110; Lowell Newton of WXYZ Detroit, Sept. 24, 1971, Detroit.

TABLE V
SOURCE RELIANCE: BEAT

Type of beat[112]	Number of Respondents[113]	Percentage of stories that depend on "regular" confidential sources[114]	Percentage of stories that depend on first-time confidential sources[114]
General assignment	290	17.4	12.1
Features	293	18.8	12.3
Police	138	22.6	11.5
Investigative	240	26.2	14.4
Trials	158	23.3	12.3
Government	316	28.3	13.3
Financial	106	25.0	12.9
Radical and militant groups	163	24.0	14.0
Minority groups	189	21.9	13.2
Sports	75	14.9	8.7
Youth and education	181	18.5	11.5

112. These categories are somewhat diluted because many reporters "specialize" in more than one kind of reporting and we asked the respondents to check as many of the categories as were appropriate. However, it was not feasible, given our desire for a short, uncomplicated questionnaire, to have each reporter who checked more than one category subdivide his answers on the rest of the questionnaire according to the type of reporting assignments for which the answers were appropriate. Thus, it is theoretically possible, for example, for a reporter to have checked "government," "trials," and "financial," to have estimated that 26-50% of his stories are based on regular confidential sources, and never to have used confidential sources in his financial reporting. If this were true, his 26-50% would nonetheless be included in the average for financial reporters as well as government and trial reporters. If a particular type of reporting assignment tends not to require confidential sources, however, reporters who have such assignments frequently enough to have checked that category will have their percentages of over-all source reliance reduced. Thus, the figures in Table V, though diluted, should reflect the *direction* of differences in source reliance for various beats though not the *extent*.

113. The figures include only those respondents who answered all three questions. *See* note 95 *supra*. The total is greater than the number of respondents who returned the questionnaire because the categories are not mutually exclusive.

114. The percentage is arrived at by using the midpoint calculation described in note 92 *supra*.

criticized phenomenon.[116] Probably for no other type of beat is the danger of being "taken in" by sources so great.[116] The more interesting indication in these data is that investigative reporters rely more heavily than do most newsmen on confidential sources, both "regular" and first-time.[117] This reliance is important because there is an unmistakable trend in American journalism, particularly among daily newspapers, toward more investigative reporting.[118] Several reasons are given for this development. First, the broadcast media have so captured the market for hot news that the print media have turned to a different news product, only to be followed in turn by the broadcast media seeking hegemony in that market as well.[119] Second, reporters who embarked upon their careers in the 1960's (some of whom are now becoming editors) tend to view their function as that of reforming society as well as describing it.[120] There have, of course, always been committed, idealistic journalists, but never before in such numbers. Third, investigative reporting requires unique skills, and the journalism profession has in the past ten years attracted persons who are far more able and better trained than ever before.[121] This is attributable to many factors, including the growth and improvement of the journalism schools, the increase in salaries, and the rebellion among talented college graduates against the corporate lifestyle.[122] Fourth, newspaper readers as a class have become much better educated, partly because of mass education and partly because of the disproportionate loss of the less educated readers to television. This better educated readership appears to want a more in-depth, reform-oriented news coverage.[123] Whatever the exact constellation of causes, newspapers are devoting a great deal more effort to investigative reporting, and that fact is significant if, as Table V suggests, this type of news coverage depends more than others on confidential relationships with news sources.

Another interesting result of the breakdown according to type of beat is that reporters covering radical and militant groups do not seem to rely on confidential sources a great deal more than do reporters with other assignments, and reporters covering minority groups rely on such sources even less than does the average reporter in the population surveyed. A possible explanation for this statistical result is that while first-rate coverage of radicals and minority groups might require many confidential sources, the over-all quality of this type of reporting is poor, and so the *average* reliance on sources on these beats is no greater than on other kinds of beats where confidential sources are not so vital to good stories.[124] The source-reliance percentages do increase somewhat if the field is limited to those reporters who answered "yes" to the survey question, "Have you ever been entrusted with confidential information from a group or person commonly labeled as "radical," "militant," "extreme" or "dissident" (e.g. Black Panthers, SDS, Ku Klux Klan)?" Among the 124 radical militant reporters in this category, the regular source figure is 26.3% and the first-time source figure is 16.5%. Among the 127 reporters in this category who have minority group beats, the regular-source figure is 22.7% and the first-time source figure is 15.1%. To understand fully the place of the confidential source on these specialized beats, however, we should have survey information spanning a longer period of time. Several of the persons I interviewed confirmed my suggestion that radical-militant and minority group coverage has gone through a succession of stages, with close relationships with sources being possible and helpful at some stages and virtually nonexistent at others.[125]

D. *Press Cooperation with Law Enforcement*

For years people have been going to jail on the basis of evidence originally acquired by newsmen. Police reporters have always had a friendly rivalry with law enforcement officials to see who could solve a case first.[126] Investigative reporters are often eager to help a

115. *See, e.g.*, Gwertzman, *Nixon is Brought into Dispute on Background Briefings of Press*, N.Y. Times, Dec. 17, 1971, at 26, col. 4; Lawrence, *The Backgrounder for Propaganda*, N.Y. Times, Dec. 22, 1971, at 35, col. 2.

116. *See* G. TALESE, *supra* note 58, at 234.

117. Although the source-reliance figures for investigative reporters are not dramatically greater than the average figures for the entire population—4% more for regular sources and 2.2% for first-time sources—it should be remembered that these figures will tend to understate the difference because of the dilution phenomenon discussed in note 112 *supra*.

118. Interviews with: Jack Mabley, *supra* note 32; Ray Brennan, *supra* note 32; Tom Powers, *supra* note 66; William Jones, *supra* note 32; Bill Farr, *supra* note 39.

119. Interviews with: Jim Hoge, *supra* note 32; William Jones, *supra* note 32.

120. Interviews with: Theo Wilson, *supra* note 32; Ray Brennan, *supra* note 32; William Jones, *supra* note 32; Jack Mabley, *supra* note 32.

121. Interviews with: Jack Mabley, *supra* note 32; William Jones, *supra* note 32; Ray Brennan, *supra* note 32; Jim Hoge, *supra* note 32.

122. *Id.*

123. *Id.*

124. Another possible explanation for the small disparity between radical-militant reporters and others is the dilution factor discussed in note 112 *supra*.

125. Interviews with: Earl Caldwell, *supra* note 42; Karston Prager, *supra* note 42; Diane Camper, *supra* note 53; Don Holt of NEWSWEEK, Aug. 6, 1971, Chicago; John Kifner, *supra* note 41.

126. Interviews with: Hal Bruno, *supra* note 34; Jerry Tallmer, *supra* note 32; Jack Mabley, *supra* note 32. This point was also made in several of the essay responses to our qualitative survey.

grand jury follow up their exposés.[127] In fact, for many newsmen the opportunity to serve as the lead-off witness in a publicized official probe is considered a mark of distinction, the next best thing to a Pulitzer Prize. Moreover, this phenomenon of cooperation with law enforcement has not been limited to reporters on specialized beats who rely on police sources. During the early 1960's in the South, reporters frequently gave information to FBI agents concerning violations of civil rights.[128] Several newsmen voluntarily testified in lawsuits seeking reparation for the allegedly lawless behavior of certain police officers during the 1968 Democratic National Convention.[129] In most of these situations, of course, the newsmen were violating no explicit confidences in contributing the information they learned to law enforcement endeavors. On the other hand, much of the information that eventually wound up in the hands of the fact-finding tribunals was obtained by reporters in loosely defined contexts not unlike some of the reporter-source relationships that are the subject of the subpoena controversy.

There can be no doubt that, quite apart from any fears about losing sources, reporters today are far more reluctant to cooperate with law enforcement officials. There are several reasons for this change of attitude.[130] First, most newsmen share a general disillusionment with the process of government as a result of the Viet Nam war, the collapse of the civil rights and poverty efforts, and the various government attempts to suppress dissent. Second, the journalism profession feels a special sense of indignity at the way it has been manipulated by the past three presidential administrations; Sander Vanocur put it to me most poignantly: "I have served as a conduit for lies."[131] Third, the special hostility that has grown up between the Nixon Administration and the press has generated a spirit of non-cooperation that carries over even to local government institutions. Fourth, the beatings that newsmen received at the hands of the Chicago police during the 1968 Democratic National Convention have left a legacy of hate throughout the journalism profession. Fifth, and in some ways most important, the technique adopted by some police departments of having their undercover agents pose as reporters has so embittered newsmen that things may never be the same even

127. Interview with Jack Mabley, *supra* note 32.

128. Interview with William Cook, *supra* note 54.

129. This fact came to light in the qualitative survey responses.

130. Interviews with: Jerry Tallmer, *supra* note 32; Jim Hoge, *supra* note 32; Theo Wilson, *supra* note 32; Steve Roberts, *supra* note 32; Don Holt, *supra* note 125; Hal Bruno, *supra* note 34.

131. Interview, *supra* note 34.

though most police departments quickly abandoned the practice and offered apologies to the press. The increased use of the subpoena power by law enforcement officials, while in many ways a result of the reduction in voluntary press cooperation, has only exacerbated the situation.

Nevertheless, despite this marked change of attitude on the part of reporters, and despite the fact that today cooperation with the government is more likely than in previous reporting eras to endanger source relationships, there still exists among virtually all reporters a strong sense of civic responsibility.[132] The essential change is that newsmen are now more inclined to judge for themselves when the civic need for their information outweighs their own professional need to respect confidences.

We attempted to measure the extent to which the press would cooperate with law enforcement even if reporters had an absolute privilege against testimonial compulsion. In pretesting our questionnaire, we listed many different categories of requests for information and asked the reporters to check those with which they would cooperate. So many respondents replied that their answers would depend on the precise circumstances that we decided for the final survey to posit a single, fairly detailed hypothetical situation and to measure the reporters' responses to a number of different requests for information growing out of that situation. The respondents were asked to consider the following hypothetical situation:

> You have a continuing source relationship with a group of political radicals. They have given you much information in confidence and this has enabled you to write several byline stories describing and assessing in general terms the activities and moods of the group. During the course of this relationship, you are present at a closed meeting with ten of these radicals at which the group vigorously debates whether to bomb a number of targets, including the local police station. The consensus is against such bombing, but two members of the group argue very heatedly in favor of bombing and are deeply upset when the others refuse to go along. These two then threaten to act on their own. The discussion then turns to another topic. Two weeks later the local police station is in fact bombed. One officer is killed by the blast and two others are seriously injured.

We then asked a number of specific questions. Table VI reports the answers from the entire population and from the more limited popu-

132. Several reporters whom I interviewed expressed a deep concern about their conflicting ethical obligations to society and to sources. Interviews with: Frank Maier, *supra* note 84; James Wechsler of the N.Y. Post, May 14, 1971, New York; Karnow Prager, *supra* note 42; J. Anthony Lukas, *supra* note 65; Jack Mabley, *supra* note 32; Wallace Turner, *supra* note 34.

TABLE VI

WILLINGNESS TO DISCLOSE INFORMATION VOLUNTARILY

Question: "In these circumstances, would you on your own initiative volunteer the information you learned at the meeting *right after the meeting* (i.e., before a bombing took place)?"

Responses:	*Yes*	*No*	*No answer*
All reporters (975)	255 (26.2%)	541 (55.5%)	179 (18.3%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	77 (21.2%)	253 (69.5%)	34 (9.3%)

Question: "Would you volunteer the information on your own initiative to law enforcement authorities *after the bombing* (but before you were contacted by the police or subpoenaed by a grand jury)?"

Responses:	*Yes*	*No*	*No answer*
All reporters (975)	367 (37.6%)	351 (36.0%)	257 (26.4%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	131 (36.0%)	178 (48.9%)	55 (15.1%)

Question: "Assume that you were subpoenaed by a grand jury investigating the bombing but that an absolute legal privilege were established so that you could not be compelled to answer questions against your will. Would you voluntarily answer if the grand jury asked you whether this group of radicals had ever discussed the possibility of bombing the police station?"

Responses:	*Yes*	*No*	*No answer*
All reporters (975)	444 (45.5%)	351 (36.0%)	180 (18.5%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	143 (39.3%)	185 (50.8%)	36 (9.9%)

Question: "If the grand jury asked you to name the members of the group who had advocated bombing?"

Responses:	*Yes*	*No*	*No answer*
All reporters (975)	360 (36.9%)	430 (44.1%)	185 (19.0%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	123 (33.8%)	205 (56.3%)	36 (9.9%)

Question: "Assume that one of the members of the group who had argued vigorously *against* the bombing was indicted for the crime and that you believed, on the basis of the meeting, that it is highly unlikely that this particular member was the bomber. Would you on your own initiative volunteer this information to the prosecutor?"

Responses:	*Yes*	*No*	*No answer*
All reporters (975)	585 (60.0%)	216 (22.2%)	174 (17.8%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	217 (59.6%)	113 (31.0%)	34 (9.3%)

Question: "If this member's defense lawyer subpoenaed you at the trial would you testify about the meeting you had witnessed (including giving the names of those who did advocate bombing) even if you were protected by an absolute privilege so that you couldn't be compelled to testify?"

Responses:	*Yes*	*No*	*No answer*
All reporters (975)	421 (43.2%)	355 (36.4%)	199 (20.4%)
Reporters who have been entrusted with confidential information from dissidents, etc. (364)	148 (40.7%)	174 (47.8%)	42 (11.5%)

lation of those reporters who answered "yes" to the question, "Have you ever been entrusted with confidential information from a group or person commonly labeled as "radical," "militant," "extreme" or "dissident" (e.g. Black Panthers, SDS, Ku Klux Klan)?"

It is interesting that so many of the reporters who returned the questionnaire were unwilling to answer this particular set of questions, and also that a higher percentage of the reporters who have had confidential dissident sources were willing to respond.[133] These phenomena would seem to substantiate a strong impression I formed in the personal interviews: most reporters simply do not know how they would react in these troubling situations that involve conflicting obligations to society and to sources. Virtually everyone agrees that there are difficult ethical questions in this area—many newsmen raised the issue with me on their own initiative[134]—but nothing like a professional consensus has yet emerged. Those newsmen who have received information that might give rise to these conflicting obligations have, not surprisingly, given more thought to the subject. Nonetheless, it is likely that of all our survey data, the responses to this set of inquiries should be given the least weight because the respondents could only guess at how they would react if the situation were to arise in real life.

In each of the six sets of circumstances, those reporters who have received confidential information from dissident sources indicated less willingness to volunteer information than the total population of of reporters. We anticipated this pattern for the first four situations posited (those in which sources could only be harmed by the reporter's cooperation); but we were somewhat surprised to learn that the reporters who have had dissident sources would be slightly less willing than the average reporter in our sample to provide information that might serve to exculpate rather than to convict.

We were particularly interested in the relationship between the willingness to cooperate in the prosecution of a case and the willingness to help a defendant. Of 338 respondents[135] who said they would *not* volunteer information about the radicals' meeting to law enforce-

133. For the entire population, 20.1% of the questions were left unanswered; for the more limited population of reporters with confidential dissident sources, 10.9% of the questions were not answered.

134. *See* note 132 *supra*.

135. Although 351 respondents said they would not volunteer the information before being subpoenaed, 13 of these did not answer the question whether they would volunteer the information if they thought the prosecutor had the wrong man. Throughout this report on the survey results, cross-tabulations include only those respondents who answered all the questions that are being cross-tabulated, so that the total will always be slightly less than the number who answered each individual question.

ment officials after the bombing but before being subpoenaed, 148 (43.8%) said they *would* volunteer information to the prosecutor if they thought he had the wrong man. Also, of 410 respondents who said they would not name names before a grand jury, 80 (19.5%) said they *would* identify the members of the group who had advocated bombing if asked to do so by the defense lawyer at the trial of a member of the group who had argued against bombing. The willingness to cooperate indicated in these data is less selective than we had expected, given the fact that preventing the conviction of an innocent man is generally recognized as the paramount value in our system of criminal justice. My personal interviews also impressed me with the strongly felt belief among reporters and editors that they must be consistent in these matters.[136] Some newspapers have even formulated internal policies prohibiting their reporters from voluntarily cooperating in certain circumstances so that the position of the newspaper will appear to be consistent should it subsequently find it necessary to contest a subpoena.[137] The prevalent attitude of newsmen can be described as a rather vehement belief that they—not the courts—should decide when cooperation with fact-finding tribunals is appropriate, but that the profession must make these decisions with an even more scrupulous regard for consistency, and the *appearance* of consistency,[138] than would be observed by judges.

We also sought to gain some understanding of where reporters "draw the line" with regard to voluntary cooperation. Of the respondents who would, even if they had an absolute privilege, tell the grand jury whether the radicals had ever discussed bombing the police station, 83.3% would also volunteer their information after the bombing without waiting to be subpoenaed. However, only 46.2% of those who would testify before the grand jury would volunteer the information before a bombing actually took place.

136. Interviews with: J. Anthony Lukas, *supra* note 63; Wallace Turner, *supra* note 94; Frank Maier, *supra* note 94; William Jones, *supra* note 22; Jack Mabley, *supra* note 22.

137. William Jones (interview *supra* note 22) told me that the Chicago Tribune has a policy of directing its reporters to refuse to answer "fishing expedition" subpoenas even if no sources would be jeopardized, simply to maintain this consistent posture. I discussed this consistency point with several executives, editors, and reporters of the New York Times, and they were so concerned about it that they were unwilling to accept many tenable distinctions that would rationalize a refusal to respond in one situation and a willingness to respond in another. Group interview with Harding Bancroft, James Goodale, Gene Roberts, J. Anthony Lukas, Paul Montgomery, Katherine Darrow, Lesley Oelsner, and Charlayne Hunter, Sept. 27, 1970, New York.

138. *See* note 137 *supra*.

Finally, given all the trends and comparisons that have been discussed in this section, it is important to emphasize that the basic phenomenon revealed by the data and the personal interviews is one of press cooperation with the process of official fact-finding. Perhaps the most significant statistic in all these data is that almost half of the journalists surveyed say they would, even if favored with an absolute privilege, give testimony before a grand jury that could well result in life imprisonment or worse for sources with whom they enjoyed a close, professionally rewarding relationship.

E. *The Uses and Effects of Press Subpoenas*

Although currently the focus of the controversy is on grand jury investigations into radical activities,[139] the use of press subpoenas is by no means limited to that context. The reported cases tell of subpoenas served on newsmen by legislative committees,[140] criminal defendants,[141] and litigants in civil cases,[142] as well as grand juries. One commentator estimates that more press subpoenas come from criminal defendants than from any other source.[143] The subject mat-

139. *E.g.*, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re* Miller, Misc. No. 134 (D. Ariz. Aug. 26, 1971); *In re* Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); *In re* Pappas, — Mass. —, 269 N.E.2d 227, *cert. granted*, 402 U.S. 912 (1971).

140. *E.g.*, *Ex parte* Lawrence, 116 Cal. 298, 4 P. 121 (1897). Recently, the House Interstate and Foreign Relations Committee served a subpoena on the Columbia Broadcasting System in conjunction with an investigation of the network's documentary, *The Selling of the Pentagon*. *See* N.Y. Times, April 9, 1971, at 1, col. 1; *id.*, June 25, 1971, at 71, col. 1 & at 85, col. 2.

141. *E.g.*, People v. Dohrn, Crim. No. 69-2089 (Cir. Ct. Cook County, Ill., May 29, 1970); People v. Rios, No. 78129 (Super. Ct. San Francisco County, Cal., July 15, 1970).

142. Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re* Goodfader, 45 Hawaii 217, 367 P.2d 472 (1961).

143. Comment, *The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 Calif. L. Rev. 1198, 1200 n.21 (1970) ("Newspaper counsel and editors are unanimous in stating that defense subpoenas are probably more numerous than governmental ones."). This is not, however, the picture that emerged from our various empirical studies. The newsmen I interviewed personally had much more experience with government subpoenas than with subpoenas from defense attorneys. The newsmen in our qualitative survey (*see* pt. II. A. *supra*) reported that in the past year they received a total of 12 subpoenas from the prosecution and 8 from the defense, and 48 informal requests for information from the prosecution and 29 from the defense. Since the subjects for my interviewing and for our qualitative survey were all chosen on an impressionistic basis (as were, presumably, the subjects for the *California Law Review*'s interviewing), one should be cautious about drawing any quantitative conclusions from any of these sources. We decided not to devote any of the limited space on our quantitative questionnaire to this particular inquiry. An amicus brief filed with the Supreme Court by several media

ter of press subpoenas also covers a wide spectrum, ranging from allegedly criminal behavior[144] to the most frivolous show business gossip.[145] Some of the brief descriptions from our qualitative survey give an indication of the variety of reporting efforts that have, at one time or another, been the subject of subpoenas and informal requests for information: "illegal gambling"; "the Julius and Ethel Rosenberg case"; "disbarment of an attorney"; "conflict of interest involving speaker of state house of representatives"; "interviews with Lieutenant Calley"; "information on a Soviet diplomat after I had lunch with him"; "Mafia investigation"; "zoning irregularities"; "taxpayer's suit to fire Angela Davis [from her UCLA professorship]"; "charity frauds." Press subpoenas are, in addition, commonly issued pursuant to motions by criminal defendants seeking a continuance or a change of venue on the basis of allegedly prejudicial trial publicity.[146]

In order to gain some appreciation of the incidence of press subpoenas, we asked in our quantitative survey, "Have you ever been served with a subpoena in conjunction with your reporting?" One hundred eighty (18.5%) of the respondents said "yes," 689 (70.7%) said "no," and 106 (10.9%) did not answer the question. We then asked, "If so, did you eventually turn over all the information requested in the subpoena?" We instructed the respondents to "[c]heck 'yes' even if you unsuccessfully challenged the subpoena." Of the 155 reporters for whom the question was applicable and who responded, 83 (53.5%) checked "yes" and 72 (46.5%) checked "no." These data should be read, however, in conjunction with a phenomenon that came to light in the qualitative survey and personal interviews: almost all subpoenas are preceded by informal discussions with the reporter, and as often as not his full cooperation is secured or an accommodation is reached at this earlier stage.[147] Thus, the number of reporters who have at some time, under some measure of compulsion, turned over all the information requested by a fact-finding tribunal is no doubt significantly larger than the 83 who said they

organizations in *Caldwell* contains an appendix that lists all "[s]ubpoenas served upon National Broadcasting Company, Inc. and Columbia Broadcasting System, Inc. and wholly owned stations from 1969 through July 1971." Of these, 53 were issued on behalf of the government and 44 on behalf of criminal defendants. Amicus Curiae Brief, Appendix, Caldwell v. United States, No. 70-57 (U.S., Oct. Term 1971).

144. *E.g.*, State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); People v. Dohrn, No. 69-5008 (Cir. Ct. Cook County, Ill., May 20, 1970).

145. *E.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

146. Several of the respondents to our qualitative survey mentioned this concern.

147. Interviews with: William Jones, *supra* note 82; Jack Mabley, *supra* note 82; Earl Caldwell, *supra* note 42.

have been subpoenaed and eventually told all. In the qualitative survey, we also learned of instances in which subpoena plans were abandoned after newsmen made it clear that they were adamant in their refusal to reveal what they knew. Thus, the number of reporters in the survey population who have successfully resisted demands for some of the information they have learned on their beats is doubtless greater than the 72 shown in the quantitative data.

What infuriates many newsmen is not so much the principle of press subpoenas, nor even the increased volume in recent years, but rather the frequency with which subpoenas are issued in what reporters view as unnecessary circumstances. The reporters I interviewed, particularly those who have built their careers around in-depth coverage of radicals, say that the Government vastly overestimates the quantity and quality of the information that is given to the press.[148] Why, these reporters ask, should their source relationships be put in jeopardy when they really can contribute nothing new to the factual inquiry? A frequently voiced complaint is that newsmen are sometimes, as in the Spock[149] and Chicago Seven[150] trials, forced to the witness stand to give cumulative evidence that is already a matter of public record. There are other situations, some newsmen believe, in which the Government subpoenas reporters to avoid blowing the cover on its own agents who have infiltrated dissident movements.[151] The comments from the qualitative survey give some indication of the depth of sentiment on these points. We asked the respondents to what they primarily attributed the recent spate of subpoenas: "It's just an easy way to get information and the freedom of the press be damned." "Laziness, inept investigative procedures and a disrespect for the press and a misunderstanding of its role." "The hungry investigator has to have something to show for his efforts and often will bite for crumbs." "Pure politics. When I do a story about 'criminal activity'—based on interviews with the 'criminals' themselves—it embarrasses law enforcement types. So they subpoena me. Invariably my testimony would be insufficient to justify indictments of my sources." "Police sometimes are too lazy or not well enough trained to build up their own cases." "Embarrassment and paranoia. Law enforcement officers do not like me to

148. Interviews with: Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41; J. Anthony Lukas, *supra* note 63.

149. Interview with Sid Zion, formerly of the N.Y. Times and SCANLON'S, Sept. 27, 1970, New York.

150. Interview with J. Anthony Lukas, *supra* note 63.

151. Interviews with: Wallace Turner, *supra* note 94; Earl Caldwell, *supra* note 42; Steve Roberts, *supra* note 82.

publicize things they did not know or did not want anyone to know they knew." "Resentment that a good reporter is as good and, in many cases, a better investigator than many enforcement people."

Although most reporters attribute the frequent issuance of "unnecessary" subpoenas to prosecutorial laziness or to misconceptions concerning how much information the press has, a substantial number of newsmen believe that subpoenas are used in some instances as a conscious device to drive a wedge between reporters and their radical sources. In our qualitative survey we suggested this as a possibility,[152] and 15 of the 67 reporters who answered said that they felt that this desire to destroy source relationships was the primary reason for the increase in press subpoenas.[153]

It is clear that the recent use of press subpoenas has generated among newsmen a great deal of resentment, recrimination, and suspicion toward the Government. It has also generated widespread fears among reporters that their sources will "dry up." The case of Anthony Ripley, now the Rocky Mountain correspondent for the *New York Times*, is cited as the paradigm.[154] Ripley, then based in the *Times* Detroit bureau, was assigned to cover an SDS national convention in East Lansing, Michigan. Establishment reporters were admitted to the meeting hall only upon payment of a $25 "press fee" and a promise not to quote directly any of the proceedings on the floor of the convention. Ripley paid his fee and sat through three days of convention rhetoric. On the last day of the convention, Bernardine Dohrn, one of the aspirants to office in the organization, described herself as a "revolutionary Communist." Feeling no ethical obligation to abide by the convention's restrictions on press coverage, Ripley violated the conditions and reported Miss Dohrn's self-description. The *Times* buried the story in the back of a thick Sunday edition, and Ripley never heard a word about his breach of faith from any SDS sources.

Several months later, however, Ripley was subpoenaed to testify before the House Committee on Un-American Activities, which was conducting a probe into radical activities. After consulting with some *Times* editors and fellow reporters, Ripley decided not to contest the subpoena, primarily because he felt no fears about violating confidences since the sum total of everything he knew about the SDS, its convention, and any of its members was already a matter of public record in his published stories. Ripley appeared before the Committee, told the representatives that his stories constituted everything he knew, and explained in very general terms the radical philosophy as he understood it from reading the newspapers. He was at the witness table for no more than twenty minutes. A few days later, Ripley received an irate phone call from Allen Young, of the Liberation News Service, who bitterly criticized Ripley for "giving legitimacy to HUAC." Several months later, Ripley was covering a street disturbance in Ann Arbor, Michigan, when a radical source he was interviewing was yanked away from him by a fellow radical and was told, "That's the fink who testified before HUAC." The source immediately terminated the interview, telling Ripley, "I just don't want to talk to you."

At the SDS national convention the following year, a resolution was passed denouncing Anthony Ripley: "Mr. Ripley, by cooperating with this committee, and the New York Times, by authorizing his appearance there, have taken the side of the nation's most notorious witch-hunters. A reporter and a newspaper dedicated to the concept of 'objectivity' have plainly illustrated once again what 'objectivity' means in fact."[155] The SDS membership then debated whether to demand from all establishment reporters seeking to cover the convention an affidavit promising not to "do a Ripley," and finally decided to bar all establishment reporters from the convention hall.[156]

These incidents were personally very upsetting to Ripley, but they did not significantly interfere with his reporting career. He never had a network of radical sources to lose; his assignments in

152. Our question read: "Recently, law enforcement authorities have been subpoenaing newsmen with much greater frequency than in the past. Do you attribute this primarily to: (1) a conscious government effort to impair source relationships in order to reduce the coverage given certain groups; (2) a greater need for help from the media, due to the difficulty of penetrating certain alienated groups by normal investigative methods; (3) a greater need for help from the media due to the overburdening of law enforcement resources; (4) other."

153. Some comments: "One television executive was told by a U.S. Attorney that if you didn't film this sort of stuff you wouldn't be having this problem." "An effort to intimidate groups they view as radical or militant." "To discredit these groups and their ideologies." "A conscious effort to influence and slant news coverage to its own advantage." "An attempt to break down the authenticity of an otherwise credible authority (newsmen)." "There is a deliberate effort, a pervasive willingness if not a conspiracy to hail reporters before government agencies at all levels to reduce effectiveness or to discredit or defuse reporters, who are threats." "In Chicago, police, U.S. and state prosecutors have developed a view of newsmen (newspapers as a result) ranging from controlled dislike to outright hatred. I view the increasing pressure on newsmen to produce information as a kind of emotional outlet within legal justification. I don't believe the process is anything so conspiratorial or calculated—except in rare cases—as an attempt to block newsmen from contacting radical sources."

154. The incident was recounted to me in a personal interview with Mr. Ripley on Aug. 13, 1971, in Denver. *See also* DeEster, *Why SDS Banned Press at Collotum*, Chi. Journalism Rev., July 1969, at 11-12.

155. Quoted in DeEster, *supra* note 154, at 11-12.

156. DeEster, *supra* note 154, at 12.

East Lansing and Ann Arbor were solely a function of his being stationed in the *Times* Detroit bureau. He subsequently was able to do a superb investigative story on the shoot-out in Cleveland between police and black militants.[157] John Kifner, a *Times* reporter who *does* specialize in movement coverage and does have many radical sources, had the Ripley incident mentioned to him on several occasions but Kifner thinks he lost no stories because of it.[158]

Anthony Ripley's case is thus not, as it is sometimes cited to be,[159] an example of a subpoena causing an intolerable interference with news flow. The incident is illustrative, however, of a very important aspect of the press subpoena controversy in its contemporary form. The primary concern of reporters is not that they will lose their sources by being made to turn over highly sensitive and secret information—newsmen almost never are privy to such information.[160] Rather, the worry is that their mere cooperation with fact-finding tribunals will alienate sources who demand to know of reporters "whose side are you on?"[161] To these sources it may make no difference that the newsman's "cooperation" with the tribunal is involuntary, perfunctory, and unhelpful. It is the principle that counts.

In fact, one of the ironies of the situation is that the press subpoena issue, and the larger government-press controversy of which it is a part, has in some respects *improved* relationships between reporters and radical sources by placing the press in a position of opposition to the Government. Earl Caldwell reports that the Black Panthers now trust him much more than they did before he contested his grand jury subpoena; the incident gave Caldwell a concrete opportunity to prove his credibility.[162] John Kifner also says that the subpoena issue has created a unity of interest that has made his white radical sources somewhat less hostile toward, and distrustful of, the establishment press.[163] This phenomenon was reported, in addition, in the responses to our qualitative survey. We asked those reporters who had been subpoenaed, many of whom successfully resisted the subpoena or accepted contempt sentences, whether the incident had affected their relationships with sources. Although several of these newsmen found some of their source relationships to have been impaired, others reported a net gain: "My contacts with the New Left and various freak-radical street people groups 'improved.' They had tolerated my presence on the basis of my pledge that I would neither testify for nor against them regardless of any risk (i.e. contempt). The incident [in which the reporter, by making it clear that he would accept a contempt citation, convinced the U.S. Attorney to withdraw a subpoena] simply made them believers. I have been able, for example, to report 'trashings' from inside." "They like me more—or disliked me less." "In both instances, relationships with both prosecuting and defense attorneys improved." A somewhat different way in which a subpoena can actually help a reporter acquire sources was suggested to me in an interview with Bill Farr, a former investigative reporter who is currently the subject of a widely publicized subpoena dispute in California.[164] Farr speculates that the publicity he has received in accepting a contempt sentence rather than revealing his source should increase the number of unsolicited tips and leads he gets simply because people who have a story to tell will have heard of him.[165]

It would be a mistake, however, to conclude from these observations that press subpoenas are an over-all boon to reporting. From my interviewing and from our qualitative survey it appears that the subpoena spate of the past two years has interfered with reporting efforts in a variety of ways. The most significant effects that subpoenas have on newsgathering are of a highly personal, and relatively unmeasurable, nature. One is the professionally incapacitating worry and hassle to which the reporter is subjected.[166] During the period that a subpoena dispute is being litigated, the reporter is ordinarily not able to cover his beat with full effectiveness. This is not so much because his sources will not talk to him but because his time is not free. He has court commitments. He must consult with his lawyer. He becomes a news source in his own right and must, ironically, fend off his colleagues. Perhaps most important, unless he has an unusual emotional constitution he must spend much of his time worrying and agonizing and re-examining his ethical position. If he loses in litigation and chooses not to break the confidence, he may

157. N.Y. Times, Sept. 2, 1968, at 1, col. 1.

158. Interview, *supra* note 41.

159. *See, e.g.*, Brief for Respondent at 27 n.30, Caldwell v. United States, No. 70-57 (U.S., Oct. Term 1971).

160. Interviews with: Earl Caldwell, *supra* note 42; John Kifner, *supra* note 41; Wallace Turner, *supra* note 34; Steve Roberts, *supra* note 32; J. Anthony Lukas, *supra* note 63.

161. *See* text accompanying notes 53-54 *supra*.

162. Interview, *supra* note 42.

163. Interview, *supra* note 41.

164. *In re* Farr, Crim. No. A253-156 (Super. Ct. L.A. County, Cal., 1971).

165. Interview, *supra* note 39.

166. Interviews with: Earl Caldwell, *supra* note 42; William Farr, *supra* note 39; Hal Bruno, *supra* note 34; Anthony Ripley, *supra* note 154.

spend a term in jail, a time commitment that can yield an exclusive on prison conditions but not many other stories.

A second way in which press subpoenas may interfere with reporting efforts concerns the intangible quality of source relationships. As suggested above,[167] good reporting frequently depends on sources who will relax and speak in a spontaneous, expansive, and candid fashion. Some reporters say that the subpoena possibility can puncture this cooperative atmosphere—even when the source is persuaded, in a rational sense, that he really has nothing to fear.[168] According to these reporters, the irrational doubt can introduce into the relationship a self-consciousness and guardedness that may preclude the possibility of in-depth, interpretive coverage. For radical and militant sources, the subpoena threat can engender this self-consciousness not only because of the fear that confidential information will be disclosed but also simply because the subpoena issue redirects attention to the question of the reporter's—and his editor's and publisher's—loyalties.[169]

Because this claimed effect is subtle and intangible, it is difficult to verify its existence or to assess its importance. Reporters are themselves unsure whether sources who do not explicitly refuse to cooperate are nonetheless holding back. In our qualitative survey, we asked those reporters who had been subpoenaed whether the incident affected their source relationships.[170] While some of the responses told of measurable damage,[171] others evinced amorphous feelings that things were not quite right: "Found a different temperament with defense source after the request—not necessarily more difficult to deal with source, but suspect answers to questions asked subsequent to incident were more guarded than answers prior to the incident." "Rather than specifics, it has been more of a general reserve rather than openness." "[C]hiefly in the form of people not contacting me to volunteer information, as before, rather than refusing information when questioned." "This is hard to say—generally, I think, members of radical groups won't tell reporters much because they feel *somehow* it'll be used against them; they usually don't give good reasons, though, for refusing to talk."

The task of evaluating this inherently unmeasurable qualitative

167. *See* text accompanying notes 51-52 *supra*.

168. Interviews with: Don Holt, *supra* note 125; Earl Caldwell, *supra* note 42; Hal Bruno, *supra* note 24.

169. *See* text accompanying notes 53-64 *supra*.

170. As detailed above (*see* text accompanying notes 182-85 *supra*), some newsmen reported a net gain in source relationships.

171. *See* text following note 182 *infra*.

dimension of the "drying up" phenomenon is complicated by an additional factor. Frequently reporters who correctly sense a reserve on the part of a source may be unsure whether the subpoena threat is a primary, or even partial, cause. The drying up of sources can result from any number of factors other than the fear of subpoenas: for example, the source's dissatisfaction with the way stories are being written by the reporter, or his newspaper, or even other reporters on other papers;[172] tactical decisions by groups or personalities to "lower their profile" temporarily;[173] expiration of the source's initial enchantment with media coverage;[174] or the source's desire to exercise more control over press coverage, if only as a mark of sophistication.[175] Most of the reporters with radical beats whom I interviewed said that the tides of source cooperation ebb and flow for reasons that transcend the subpoena threat.[176] And for most of these situations in which the causes of noncooperation are unclear it is virtually impossible to isolate the discrete impact of the subpoena threat, particularly since reporters try in dealing with sources to avoid any mention of the subject for fear of generating irrational fears that would not otherwise be operative.[177]

When the source *is* aware of the subpoena threat and conveys his doubts to the reporter, the impact of press subpoenas on the newsgathering process can be ascertained with a greater degree of reliability. One tangible ramification of the subpoena controversy is that some sources will no longer allow reporters to tape-record interviews. Several of the respondents in our qualitative survey mentioned this as the most immediate manifestation of source inhibitions. Earl Caldwell says that he used to have "open tape" sessions with the Black Panthers in which he would just let the tape recorder run for several hours to capture the daily routine at Panther headquarters. Now, says Caldwell, both he and the Panthers are unwilling to do this—precisely because of the subpoena threat.[178]

172. *See* text accompanying notes 76-79 *supra*. John Kifner recently found it very difficult to get a counterculture life style story in Colorado because of some previous insensitive stories by reporters from other newspapers. Interview, *supra* note 41.

173. Interviews with: Steve Duncan, *supra* note 40; Steve Roberts, *supra* note 32; John Kifner, *supra* note 41; Karsten Prager, *supra* note 42; Peter Goldmann, *supra* note 32; Don Holt, *supra* note 125.

174. Interviews with: John Kifner, *supra* note 41; Steve Roberts, *supra* note 32; Karsten Prager, *supra* note 42.

175. Interview with Martin Kaiserkorl, *supra* note 68.

176. Interviews with: John Kifner, *supra* note 41; Martin Kaiserkorl, *supra* note 68; Joseph Lelyveld, *supra* note 94; Steve Roberts, *supra* note 32.

177. Interview with Peter Goldmann, *supra* note 32.

178. Interview, *supra* note 42.

Another measurable way in which the subpoena fear hampers some reporting is by greatly increasing the time it takes to get a story. With cajoling and elaborate promises it is often possible to quiet a source's subpoena anxieties, but these techniques take time. Sometimes, for example, a source will delay an interview until he has "checked out" the reporter through the grapevine.[179] Sources are now less willing to receive a newsman on the basis of a recommendation from another reporter whom the source trusts.[180] John Kifner, who probably has as extensive and as long-standing a network of "movement" sources as anyone, says that recently it took him six weeks to do a story on the Berrigans that should have been a two-day assignment.[181] This time factor is particularly important in light of the belief expressed to me in several interviews that the key to first-rate reporting, especially in covering dissident movements and life styles, is to check a story with as many different sources as possible rather than to rely on only a few sources, however well placed they may be.[182]

Finally, there is the ultimate form of impairment of press coverage: a firm refusal by the source to grant an interview or to give the reporter certain information because of the fear of a subpoena. We asked the reporters in our qualitative survey if they had ever experienced this kind of rejection. Several respondents cited specific instances in which they lost whole stories or valuable information because of the subpoena threat. For example: "[T]he incident [being subpoenaed] and subsequent publicity cost me several good sources on the fringe of the underworld. The loss was measurable." "In a recent investigation of court corruption in Chicago, several persons with first-hand knowledge of fixes in civil personal injury cases refused to talk in specifics despite assurances that I would not testify as to my sources." "Three instances come to mind quickly—a story that I did on draft dodgers in Canada, a story on black panther demonstrations at Yale, and a story involving an anti-war demonstration in Washington." "Once, in covering a bank failure, a teller who was worried that any information he would give me would eventually expose him refused to come through at the last moment, even though he really wanted to make the information public. The information itself could not be traced to him. He was fearful though that

179. Interview with Kenton Prager, *supra* note 42.

180. Interview with Earl Caldwell, *supra* note 42.

181. Interview, *supra* note 41.

182. Interviews with: Steve Roberts, *supra* note 32; Earl Caldwell, *supra* note 42; Wallace Turner, *supra* note 94.

I would be forced to identify him in court as my news source." "Story involving draft resisters in federal prison, who refused to relate certain allegedly illegal practices."

Among news items of contemporary importance, coverage of fugitives and others who have "gone underground" appears to suffer greatly because of the subpoena threat. One of the respondents to the qualitative survey did a story on fugitives and reports that "[s]everal people voiced concern that I might be forced to testify about their whereabouts." He continues, "Can't be sure, tho I think several people I approached on the above mentioned fugitive piece backed out for that reason." John Kifner says that he feels fairly confident that if it were not for the subpoena danger he could get some very significant stories on several radicals who are currently working underground.[183]

The qualitative survey responses suggest some reasons why certain sources will decline to give a reporter information even though he promises to go to jail to protect the confidence. After actually serving time for refusing to testify in response to a subpoena, one respondent said, "Definitely found my relationship with sources *impaired* afterwards—for at least 2 reasons: (a) sources with criminal information were reluctant to see and give me information because they assumed that I was under constant surveillance, (b) sources with criminal information who were also friends or acquaintances simply did not want to see me go to jail again for withholding information, which they knew I would if subpoenaed again." Some other comments: "In reporting on drug use in a local park, young people openly expressed a fear that reporters were arms of the police and—whether the reporter was willing or not—police had access to his information by subpoena." "Particularly since the Caldwell case, the radicals that I often interview are concerned that being honest with me could be dangerous. They worry that even if I don't at that moment intend to cooperate with the police, future pressure might develop."

One potential "future pressure" that makes sources reluctant to cooperate even with reporters whom they trust is a decision by media executives, especially those fearful of losing valuable broadcast licenses, not to support a reporter who wishes to resist a subpoena.[184] Anxieties of this sort were felt two years ago when some important

183. Interview, *supra* note 41.

184. Interviews with: Helen Mead, *supra* note 48; William Cook, *supra* note 54; Kenton Prager, *supra* note 42.

organizations, including the *New York Times*[185] and *Newsweek*,[186] initially displayed some uncertainty regarding their stance on the subpoena issue and others, including CBS[187] and *Time*,[188] handed over confidential information to law enforcement authorities as a result of some bureaucratic failures of communication. Some of the responses to the qualitative survey indicate, moreover, that source fears about a "publisher's sell-out" are not without basis: "My newspaper has a continuing relationship with the FBI." "[P]hotos taken at demonstrations of various types have been provided to the FBI at the agency's request." "Oftentimes, carbons of news stories [containing unedited material] were given out." As a result of the crystallization of the issue and angry protests from reporters, many media organizations have revised their practices and taken a strong stand against subpoenas. However, the incident portrayed in the movie *Medium Cool*, in which a reporter's notes and tapes are without his knowledge turned over to the police, cannot be dismissed as a figment of the Hollywood imagination.

It appears from this evidence that the practice of subpoenaing reporters has, in several instances, had a significant detrimental effect on the quality of news coverage. Under some interpretations of common-law principles and of the free-press clause of the first amendment, this empirical finding would be sufficient to compel the recognition of a privilege for newsmen. Other interpretations, however, will place more emphasis on the frequency, extensiveness, and continuity of the detrimental effect. Several aspects of our quantitative study were directed to these questions.

We asked the respondents, "In the last eighteen months, has your coverage of any story been adversely affected by the possibility that you might be subpoenaed?" Because the causes of noncooperation by sources are frequently unclear,[189] and also because we were afraid that some reporters would resolve ambiguities in favor of a "yes" response, we offered three choices: "yes," "no," "I'm not sure." Of the 887 newsmen who answered the question, 71 (8.0%) said "yes," 97 (10.9%) said "I'm not sure," and 719 (81.1%) said "no." Table

185. Interviews with: J. Anthony Lukas, *supra* note 63; Steve Roberts, *supra* note 32; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41.

186. Interview with William Cook, *supra* note 54.

187. Interview with Helen Mead, *supra* note 48. The "outtakes" (unused portions of video tape) from an interview with Eldridge Cleaver were given to federal law enforcement authorities through a bureaucratic mishap. The reporter who conducted the interview, Mike Wallace, received strong rebukes from the Panthers. *Id.*

188. Interview with Jason McManus, *supra* note 57.

189. *See* text accompanying notes 172-77 *supra*.

TABLE VII
ADVERSE EFFECT: TYPE OF BEAT

Type of beat	Number of responses	Yes	I'm not sure	No
General assignment	320	36 (9.5%)	47 (12.1%)	307 (78.7%)
Features	294	29 (9.9%)	37 (12.6%)	228 (77.6%)
Police	139	16 (11.5%)	26 (18.7%)	97 (69.8%)
Investigative	242	31 (12.8%)	35 (14.5%)	176 (72.7%)
Trials	138	24 (17.4%)	27 (19.6%)	87 (63.0%)
Government	320	29 (9.1%)	39 (12.2%)	252 (78.8%)
Financial	106	9 (8.5%)	12 (11.9%)	85 (80.2%)
Radical and militant groups	163	25 (15.3%)	31 (19.0%)	107 (65.6%)
Minority groups	191	25 (13.1%)	28 (14.7%)	138 (72.3%)
Sports	75	9 (12.0%)	13 (17.3%)	53 (70.7%)
Youth and education	183	21 (11.5%)	21 (11.5%)	141 (77.0%)
Other	259	19 (7.3%)	30 (11.6%)	210 (81.1%)

VII shows the breakdown of responses according to type of beat. One must be extremely cautious in drawing conclusions from these data[190] but, generally speaking, they are consistent with an impression I gained during the personal interviews: within the broad range of situations for which future legal proceedings are a possible contingency, the impact of the subpoena threat is primarily a function not of the subject matter of the story so much as the approach of the reporter. Newsmen who pay little attention to verification and interpretation and who rely heavily on a limited number of regular sources tend to be relatively unaffected by the subpoena threat, even when they are covering radical and militant activities. The reporters most hindered by the possibility of being subpoenaed are those who seek a composite picture, who check and cross-check their information with numerous sources (particularly sources who are not officially designated "spokesmen," and who are relatively inexperienced and cautious about dealing with the press), and who keep extensive files and tapes for future verification reference and for trend stories. Because of deadline pressures, budgetary constraints, and endemic laziness, there are not very many newsmen who operate in this latter fashion. Those who do tend to be concen-

190. Since the respondents were permitted to check as many of these categories as were appropriate, and since a "yes" response would register in each of the categories checked, the responses to the adverse-effect question of those who checked several type-of-beat categories weigh disproportionately in this Table. This phenomenon appears to explain the fact that all but one of the categories show a higher "yes" response percentage than was recorded for the population as a whole. Also, since a "yes" response based on an adverse effect concerning a radical-militant story would also show up in the other categories that the respondent checked, the data shown in Table VII should be read only to suggest the *direction* not the *extent* of the comparisons indicated. In retrospect, we probably should have asked the respondents to check only the type of beat that most characterizes the kind of reporting they do.

trated in a few news organizations but tend not to be concentrated on any particular beats.

This explanation is substantiated somewhat by the breakdown according to type of news medium. Table VIII gives these data.

TABLE VIII
ADVERSE EFFECT: TYPE OF MEDIUM

Type of medium	Number of responses	Yes	I'm not sure	No
Daily press	456	34 (7.7%)	43 (9.4%)	379 (83.1%)
Wire service	50	2 (4.0%)	6 (12.0%)	42 (84.0%)
Underground press	35	5 (14.3%)	7 (20.0%)	23 (65.7%)
Network television	49	4 (8.2%)	9 (18.4%)	36 (73.5%)
Local radio and television	121	7 (5.8%)	17 (14.0%)	97 (80.2%)
Newsweekly	127	14 (11.0%)	18 (14.2%)	95 (74.8%)
Other magazines and free-lance	98	7 (7.1%)	9 (9.2%)	82 (83.7%)

Newsweekly correspondents—who generally work under less deadline pressure than other reporters, compile fairly extensive files using many different sources, and engage in an interpretive style of reporting—feel more adversely affected by the subpoena threat than do most other journalists. Likewise, local-broadcast and wire-service journalists, who appear to devote less effort to verification and interpretation, indicate that the subpoena threat has had little impact on their reporting.[191] However, the disparity in the figures, while suggestive, is not great enough to justify any firm conclusion that the effect of the subpoena threat is significantly related to the depth of news coverage.

Similarly, such a relationship is suggested, but by no means confirmed, by comparing the estimates of adverse effects among reporters with different levels of experience. In my personal interviewing I found an unmistakable consensus on the point that the younger, less experienced reporters tend to be more talented, more probing, more thorough, and more interested in verification, as well as more committed to social causes.[192] And as one might expect, these reporters tend to feel the effect of the subpoena threat more than do their older, more experienced colleagues. Of the 437 reporters in our survey who have had 10 years of experience or less, 41 (9.4%) said their ability to cover a story had been adversely affected in the past 18 months because of the subpoena threat, 53 (12.1%) answered "I'm not sure," and 343 (78.5%) reported no adverse effect. In comparison, among the 421 respondents with 11 or more years of experience as a full-time reporter, the figures were: "yes," 23 (5.5%); "not sure," 44 (10.5%); "no," 354 (84.1%). Again, these disparities are suggestive but not conclusive, particularly since they might be traceable in part to other variables, such as type of beat and type of medium.

191. The comparatively high incidence of adverse effect claimed by reporters for underground publications is probably not explicable in terms of their greater efforts at verification, but the high incidence is not surprising in light of other factors: the underground press' emphasis on movement news; its greater access to sensitive information; the likelihood that law enforcement authorities are less solicitous of its journalistic needs; and its more limited resources for contesting subpoenas, either in court or in the forum of public opinion.

192. *See* notes 101 & 121 *supra* and accompanying text.

Two other cross-tabulations reveal a slightly more pronounced concentration of impact from the subpoena threat. If one limits the population to the 364 respondents who answered "yes" to the question, "Have you ever been entrusted with confidential information from a group or person commonly labeled as "radical," "militant," "extreme," or "dissident" (e.g. Black Panthers, SDS, Ku Klux Klan)?", the indications of adverse effects resulting from the subpoena possibility increase. Forty-four of these respondents (12.1%) answered "yes" to our question whether their ability to cover a story had been adversely affected in the past 18 months, another 55 (15.1%) said "I'm not sure," and 265 (72.8%) said "no." We also decided to divide the figures in terms of the respondents' own judgments of how well qualified they were to respond to the questionnaire. We asked each reporter to rate himself: "On the basis of my experiences with the subpoena threat and the type of reporting I do, I consider myself, in comparison with other reporters, very well qualified, fairly well qualified, somewhat qualified, not well qualified to respond to this questionnaire." Table IX shows this breakdown.

TABLE IX
ADVERSE EFFECT: HOW WELL QUALIFIED

How well qualified	Number of responses	Yes	I'm not sure	No
Very well qualified	147	24 (16.3%)	16 (10.9%)	107 (72.8%)
Fairly well qualified	198	20 (10.1%)	29 (14.6%)	149 (75.3%)
Somewhat qualified	239	18 (7.5%)	30 (12.6%)	191 (79.9%)
Not well qualified	268	6 (2.2%)	18 (6.7%)	244 (91.0%)

These markedly higher figures (almost 27.2% answering either "yes" or "not sure") for those who have been entrusted with confidential information from dissident groups and those who consider

themselves very well qualified would seem to support the suggestion from the personal interviews and the qualitative survey that the subpoena threat really hinders only a certain subpopulation of reporters. For this subpopulation, which appears to be characterized as much by reporting techniques as by type of beat, the subpoena possibility unmistakably has caused *some* losses of stories, and parts of stories, and opportunities for verification. Whether this "some" is "enough" to justify a newsman's privilege is a legal rather than empirical question.

F. *The Impact of a Privilege*

Simply because the practice of subpoenaing reporters appears to have an adverse effect on the newsgathering process, it does not follow that the arguments for a common-law, statutory, or constitutional newsman's privilege are necessarily persuasive. The counter-arguments based on the evidentiary gains of press subpoenas may be forceful. Or it may be that no legal privilege would be able to allay the often intangible, sometimes irrational fears that haunt sources. Many of our empirical efforts were devoted to finding out whether a privilege would make much of a difference and, if so, how it would do so.

First, we asked, "If the confidentiality of reporter-source relationships were protected by a legal privilege, would your reporting be helped in any of the following respects?" We then listed four possibilities and asked the respondents to check as many as were appropriate. Table X shows the responses to the four suggestions, both from the total population and from the more limited population of those reporters who answered either "yes" or "not sure" to the question whether their ability to cover a story in the previous 18 months had been adversely affected by the subpoena possibility. These figures seem to support an impression that I formed from the personal interviews and from some of the statements in response to the qualitative survey: reporters commonly make promises of confidentiality and sources commonly refuse to believe the promises, often because they fear that the reporter's editors and publishers will force him to cooperate with official requests for information. Several reporters told me that the court of appeals' ruling in *Caldwell v. United States*[193] that Caldwell was not required to appear before the grand jury has helped them substantially in their dealings with sources in just the way suggested by these data. When sources are hesitant to trust the reporter or fearful about the future pressures to which he may be subjected, a mention of the *Caldwell* ruling can lend to his promises of confidentiality the extra credibility that is necessary to get the sources to talk.[194]

193. 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971).

TABLE X

"If the confidentiality of reporter-source relationships were protected by a legal privilege, would your reporting be helped in any of the following respects? (Check as many as are appropriate)."

	Total population (975)	Respondents adversely affected or not sure (168)
"Legal protection would enable me to give sources a firmer promise of confidentiality than I can give them at present."	386 (39.6%)	97 (57.7%)
"Legal protection would make sources more willing to believe my current promises of confidentiality."	429 (44.0%)	111 (66.1%)
"Legal protection would make sources more willing to talk in situations in which I do not make explicit promises of confidentiality."	278 (28.5%)	69 (41.1%)
"Legal protection would eliminate my own inhibitions due to the subpoena threat in pursuing certain stories and publishing certain material."	173 (17.7%)	58 (34.5%)

More problematical, on the other hand, is the impact of the less-publicized privileges that have been established for newsmen by statute in 18 states.[195] The lack of awareness of these statutes is remarkable. We asked the respondents, "Does the state in which you do most of your work have a 'shield law' which protects the confidentiality of source relationships in certain circumstances?" Of the 421 respondents in our survey who listed one of the shield law states as the state in which they do most of their work, only 149 (35.4%) were able to say with certainty that their state has a statutory priv-

194. Interviews with: John Kifner, *supra* note 41; Ray Brennan, *supra* note 32; Karston Prager, *supra* note 42.

195. ALA. CODE tit. 7, § 370 (1960); ALASKA COMP. LAWS ANN. §§ 09.25.150 to .220 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1970); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West 1966); Ill. Legis. H. Bill 1756, 1971 General Assembly; IND. STAT. ANN. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1962); LA. REV. STAT. tit. 45, §§ 1451-53 (Supp. 1970); MD. ANN. CODE art. 35, § 2 (1971); MICH. COMP. LAWS ANN. § 767.5a (1968); MONT. REV. CODES ANN. tit. 93, §§ 601-1 to 601-2 (1964); NEV. REV. STAT. § 48.087 (1969); N.J. STAT. ANN. § 2A:84A-21 (Supp. 1971); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIVIL RIGHTS LAW § 79-h (McKinney Supp. 1970); OHIO REV. CODE ANN. § 2739.12 (1953); PA. STAT. ANN. tit. 28, § 330 (Supp. 1971).

ilege for newsmen; 211 (50.1%) said, "I'm not certain," and 61 (14.5%) were under the mistaken impression that their state has no shield law.

In determining whether there ought to be a newsman's privilege, one must consider not only the newsgathering gains to be had thereby, but also the evidentiary losses. From the personal interviews and the qualitative survey responses, I formed the distinct impression that newsmen seldom possess information that might be considered vital to the fact-finding endeavors of legal tribunals. The most important exception to this generalization is the story on victimless or politically oriented crimes for which the reporter may be permitted to be an eyewitness and will thus know the identities of the principals. Whatever value one may attach to the successful prosecution of such offenses and to unhindered fact-finding in any of the other situations for which newsmen may have relevant evidence, one must be careful to consider only the *incremental* evidentiary costs that the recognition of a newsman's privilege would entail. I have already discussed our findings concerning the level of voluntary cooperation that would exist even if journalists were favored with an absolute privilege.[196] Another consideration is the level of noncooperation that exists even when newsmen have no privilege and must therefore pay for their recalcitrance with fines and jail sentences. It is the middle range—the situations in which newsmen would not volunteer the information but would eventually turn it over under subpoena in the absence of a privilege—that constitutes the evidentiary stake that is at issue.

We asked our respondents, "Generally speaking, would you be willing to go to jail in order to protect important source relationships which you believed ought to be privileged but which were not under the existing law if you were advised by your lawyer that the sentence would probably be 30 days but might be as much as 6 months?" Of our 975 respondents, 667 (68.4%) said "yes," 140 (14.4%) said "no," and 168 (17.2%) did not answer the question. Among the 364 respondents who had been entrusted with confidential information from dissident sources, the willingness to go to jail to protect confidences was even greater: 297 (81.6%) said "yes," 40 (11.0%) said "no," and 27 (7.4%) did not answer the question. These figures should be somewhat discounted, however, for at least two reasons. First, it is much easier to talk about going to jail than it is to face up

196. *See* pt. II. D. *supra*.

to that prospect when it is a reality. In personal interviews some reporters admitted to me that their promises to sources to go to jail if necessary to protect confidences are premised on the firm belief that it will never come to that and that, even if it did, the sentence would be minimal.[197] Second, one of the reporters whom I interviewed confessed that his willingness to go to jail is somewhat influenced by the fact that the constitutional question is in doubt and the journalism community is consciously taking a strong stand on the issue. If the courts were to rule firmly against the press, he says that his judgment on the difficult ethical question would be affected and the tactical incentives for martyrdom would be removed. My guess is that this newsman, who must be cited here on a not-for-attribution basis, is atypical only in his candor. Nevertheless, many journalists have actually accepted contempt citations rather than breach their confidences with sources,[198] and the asserted willingness to go to jail —even if discounted—is impressive.

The news-flow gains and evidentiary losses that would result from a newsman's privilege will vary depending on whether the privilege is absolute or qualified and, if the privilege is qualified, what precise scheme of qualification is selected. Most of the statutory privileges protect only the identity of confidential sources and not the contents of confidential communications.[199] Some of the recent subpoena disputes, however, have involved requests for the contents of communications from known sources.[200] We were interested to know which category of information our respondents thought was most important to protect. We asked:

> The confidentiality of source relationships embraces two broad categories of information: 1) the *identity* of sources; and 2) the *contents* of communications. Proposals for a newsman's privilege vary with respect to which of these two categories is given the more complete protection. While you may favor absolute protection for both, if you had to pick one category of information for the more complete protection which would you choose?

197. Interviews with: David Burnham, *supra* note 45; Jack Mabley, *supra* note 32; Joseph Lelyveld, *supra* note 34.

198. Mark Knops of the Madison Kaleidoscope, for example, spent several months in jail after he refused to breach a source confidence. *See* State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

199. *Compare* N.Y. Civil Rights Law § 79-h (McKinney Supp. 1970), *with* Ore. Rev. Code Ann. § 2739.12 (1953).

200. *E.g.*, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971); *In re* Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970).

Of the 820 reporters who answered this question, 746 (91.0%) said "the identity of confidential sources," and 74 (9.0%) said "the contents of confidential communications." The 539 reporters in our survey who have been entrusted with confidential information from dissident sources[291] were only slightly less inclined to consider protection for identity to be more important than protection for contents: 506 of these respondents (90.3%) checked "identity" and 53 (9.7%) checked "contents." Most of the persons whom I personally interviewed confirmed this preference.[292] Several of these newsmen, however, considered the question a Hobson's choice. They stressed the point that both categories are important and that, if a newsman's privilege is to be qualified, the exceptions should be constructed along lines other than this dichotomy between identity and contents.[293]

In pretesting our quantitative survey, we found that many respondents were reluctant even to talk about a qualified privilege because they believed that they should have an absolute protection against subpoenas. We sought to learn from these reporters, however, not their opinions on the overall value question, but rather their judgments on some of the empirical components of the larger value question. Therefore, we asked the respondents to rate, from the standpoint of newsgathering, four qualified privileges that seemed, although vastly different in structure, to be comparable in terms of orientation toward the competing newsgathering and evidentiary interests. To avoid a possible bias caused by the order in which the choices appeared, we scrambled them so that each choice appeared in each of the four positions on 25% of the questionnaires. Table XI shows the results.

Had it not been for what I learned during the personal interviews, these results would have surprised me. Writing about the press subpoena controversy at the outset of this study, I suggested that any newsman's privilege "should be qualified in such a way that the exceptions are known to newsmen and sources at the moment of contact."[294] That way, I thought, reporters could give their sources

291. Actually 564 respondents had been so entrusted, but only 539 of these answered our question about which category of information needs the stronger protection.

292. E.g., interviews with: Jerry Tallmer, *supra* note 82; Hal Bruno, *supra* note 24; Joseph Lelyveld, *supra* note 24.

293. *Id.* Also, interviews with: Jason McManus, *supra* note 57; Peter Goldman, *supra* note 82.

294. Bind, *Press Subpoenas: Privilege in Time of Violence*, The Nation, Dec. 21, 1970, at 626.

TABLE XI

"Solely in terms of your ability to acquire and maintain source relationships (*i.e.*, quite apart from your judgment regarding overall fairness considering both sides of the issue), rank the following forms of a qualified privilege from 1 to 4, using 1 to indicate the most desirable and 4 to indicate the least desirable form of privilege."

Phrasing of privilege	Number of respondents who ranked the privilege most desirable (#1)	Number of respondents who ranked the privilege second most desirable (#2)	Number of respondents who ranked the privilege third most desirable (#3)	Number of respondents who ranked the privilege least desirable (#4)	Average ranking among all respondents	Average ranking among the respondents who have been entrusted with confidential information from dissident sources	Average ranking among reporters who have been adversely affected by the subpoena threat in the last eighteen months
No protection when a crime of physical violence has been committed, there is reason to believe that the newsman has important information, and all non-press sources of the information have been exhausted; information obtained by the newsman protected by a privilege in all other circumstances.	340 (47.5%)	196 (27.4%)	127 (17.7%)	53 (7.4%)	1.85	1.85	2.02
No protection when the judge determines that the information is needed to prevent a "miscarriage of justice;" information obtained by the newsman protected by a privilege in all other circumstances.	272 (38.0%)	160 (22.6%)	157 (21.9%)	118 (16.5%)	2.17	2.12	2.00
No protection against subpoenas issued by courts pertaining to pending civil and criminal litigation; complete protection against all subpoenas issued by grand juries, legislative committees, and other investigatory bodies.	54 (7.6%)	199 (27.9%)	254 (35.5%)	227 (32.8%)	2.86	2.84	2.80
No protection for information pertaining to planned future violations of the law, the whereabouts of fugitives, eye witness testimony, verification of published or broadcast stories, and information understood to be "on the record;" all other information protected by a legal privilege.	44 (6.2%)	152 (20.5%)	188 (25.9%)	322 (44.4%)	3.00	3.00	2.81

unequivocal assurances of legal protection for all information not covered by the defined exceptions to the privilege. If, on the other hand, protection depended on contingencies such as the availability of nonpress sources and the importance of the information to the particular fact-finding endeavor, I surmised that sources would be deterred from speaking because they could be given only contingent promises of legal protection. The quantitative-survey results and the opinions expressed to me during the personal interviews,[205] however, point to precisely the opposite conclusion. If predictability at the point of reporter-source contact were the controlling consideration, the fourth choice presented in Table XI should have been favored. In fact, this choice was rated, on the average, to be the least desirable form of qualified privilege. I also would have thought, before the personal interviews, that newsmen would prefer a phrasing of the privilege that minimized the discretion of the judge and provided, instead, for a relatively mechanistic legal standard that would not lend itself to judicial manipulation in response to public passions. The third choice listed in Table XI offered one such mechanistic legal standard, but this choice too was strongly disfavored by the reporters in our survey.

Our respondents' distinct preference for the first and second choices is explicable in the light of some of the observations made to me in the personal interviews. As detailed above,[206] many reporters emphasize the point that they seldom have information of genuine evidentiary value. If the reporter's testimonial obligation were limited to those few instances in which he really does have important information that is not available through nonpress sources, and if some provision were made to protect confidences in stories about victimless crimes, the contingency of press involvement with official fact-finding would be so remote as to have only a negligible impact on the flow of news. Again, the press' deep resentment of "unnecessary" subpoenas seems to be reflected in the data.

Daniel Feldman, an attorney who has represented the *Chicago Daily News* and *Sun-Times* in numerous subpoena disputes, suggested to me a practical reason why the first choice listed in Table XI might be most effective in preventing unnecessary subpoena

205. *E.g.*, interviews with: Wallace Turner, *supra* note 34; Peter Goldman, *supra* note 32; Don Holt, *supra* note 125; Jim Hoge, *supra* note 32; John Kifner, *supra* note 41.

206. *See* text accompanying notes 63 & 160 *supra*.

requests.[207] With a mechanistic rule, he observed, there is nothing left to litigate or, by extension, to negotiate—there is no legal restraint on unnecessary subpoenas that can be fit under one of the defined exceptions to the privilege. But with a flexible standard that demands a set of particularistic findings before a subpoena can issue, there is some disincentive to subpoena requests that are motivated by laziness. If prosecutors and defense lawyers face the prospect of having to justify their subpoena requests with some documentation, they are likely to make those requests only when they perceive a genuine need. Wallace Turner, who as San Francisco bureau chief of the *New York Times* has been deeply involved with the *Caldwell* case, suggested to me this same rationale, articulated in more cosmic terms: "Accountability is what makes social institutions work."[208]

One further consideration, which may also explain the preference for a flexible privilege, was mentioned to me repeatedly in the personal interviews. What really matters, in the judgment of many newsmen, is the basic recognition in principle of a newsman's privilege; the precise wording is not so important.[209] The *Caldwell* decision, for example, has had a remarkable effect in "clearing the air,"[210] despite the fact that the court's holding was sharply qualified.[211] The exception-riddled guidelines that were handed down by the Attorney General[212] in the aftermath of the furor over the Cald-

207. Interview, Nov. 17, 1970, Chicago.

208. Interview, *supra* note 34.

209. Interviews with: Peter Goldman, *supra* note 32; Hal Bruno, *supra* note 34; Don Holt, *supra* note 125; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41.

210. Interviews with: Ray Brennan, *supra* note 32; John Kifner, *supra* note 41; Frank Maier, *supra* note 84; Jim Hoge, *supra* note 32; Karston Prager, *supra* note 42; Hal Bruno, *supra* note 34.

211. [T]he rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source.
434 F.2d at 1090.

212. The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.

The Department of Justice does not consider the press "an investigative arm of the government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media.

In these negotiations, where the nature of the investigation permits, the gov-

well subpoena have also had surprisingly salutary effect.[213] In dealing with sources, newsmen say that they try to avoid any mention of the subpoena contingency;[214] when the subject is raised, they discuss legal and extra-legal resistance in terms of broad commitments, not legal nuances.[215]

On the other hand, this relative unconcern with the details of a newsman's privilege was not reflected in the quantitative survey. We asked, "Would the qualified privilege which you have ranked #1 adequately protect you in your relationships with your sources, or is a stronger privilege needed?" Although a majority of the 773 reporters who answered this question (475–61.4%) said "#1 is adequate," it seems significant that 298 (38.6%) of the respondents said

cument should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General.

If a subpoena is obtained under such circumstances without this authorization, the department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

C. The government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

D. Authorization for requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassments on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.

ATTORNEY GENERAL'S GUIDELINES FOR SUBPOENAS TO NEWS MEDIA, in 7 CRIM. L. REP. 2081 (Sept. 2, 1970).

213. Interviews with: Hal Bruno, *supra* note 34; Wallace Turner, *supra* note 34.

214. Interviews with: Peter Goldman, *supra* note 32; John Kifner, *supra* note 41.

215. Interview with John Kifner, *supra* note 41.

"a stronger privilege is needed." Moreover, a majority (167–50.3%) of the 332 reporters who have been entrusted with confidential information from dissident groups expressed the belief that a stronger privilege is needed. Part of this response probably can be attributed to the fact that it is difficult in any context to answer "no" to the question, "Do you want more?" Nonetheless, I was surprised by the number of reporters in the quantitative survey who were willing to say that the best of the qualified privileges offered them on the questionnaire was not enough.

My contrary impression from the personal interviews that newsmen are generally willing to accept a qualified privilege may be closely intertwined with a parallel impression that emerged with compelling clarity. Nothing, in the opinion of every reporter with whom I discussed the matter, would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit's *Caldwell* holding.[216] Several newsmen told me that initially they were extremely worried by the subpoena spate of two years ago but that now their anxieties have greatly subsided as a result of the strong stand taken by the journalism profession and the tentative victories in court.[217] However, a Supreme Court declaration that the first amendment is in no wise abridged by the practice of subpoenaing reporters would, these newsmen assert, set off a wave of anxiety among sources.[218] The publicity and imprimatur that would accompany such a Court holding would, in the opinion of these reporters, create an atmosphere even more uncongenial to source relationships than that which existed two years ago, when the constitutional question remained in doubt.[219] Many newsmen told me that they would be happy to accede to more qualifications and exceptions in the wording of a privilege if the probability were thereby increased that the Supreme Court would recognize the basic principle of a newsman's privilege.[220] These estimates of the impact of a reversal in *Caldwell* are pure speculation, and only as such should

216. Interviews with: Frank Maier, *supra* note 84; Don Holt, *supra* note 125; John Kifner, *supra* note 41; Elizabeth Coleman, *supra* note 64; Ray Brennan, *supra* note 32; Jim Hoge, *supra* note 32; Karston Prager, *supra* note 42; William Cook, *supra* note 54; Wallace Turner, *supra* note 34.

217. Interviews with: Karston Prager, *supra* note 42; William Cook, *supra* note 54; J. Anthony Lukas, *supra* note 63; Peter Goldman, *supra* note 32.

218. Interviews with: Frank Maier, *supra* note 84; Don Holt, *supra* note 125; John Kifner, *supra* note 41; Karston Prager, *supra* note 42; Jim Hoge, *supra* note 32.

219. *Id.*

220. Interviews with: Hal Bruno, *supra* note 34; Wallace Turner, *supra* note 34; John Kifner, *supra* note 41; Peter Goldman, *supra* note 32.

they be accorded weight in one's empirical analysis. But if these widely and strongly held opinions of reporters are to be given any credence, the press subpoena controversy should be resolved with careful consideration devoted to the symbolic aspects of any decision.

III. Conclusion

The results of a wide-ranging empirical study of the sort that I have undertaken cannot be telescoped into a tidy conclusion. Nevertheless, it may be useful for me to identify those findings and impressions that I regard as the most important and the most interesting. They are as follows: (1) good reporters use confidential source relationships mainly for the assessment and verification opportunities that such relationships afford rather than for the purpose of gaining access to highly sensitive information of a newsworthy character; (2) the adverse impact of the subpoena threat has been primarily in "poisoning the atmosphere" so as to make insightful, interpretive reporting more difficult rather than in causing sources to "dry up" completely; (3) understandings of confidentiality in reporter-source relationships are frequently unstated and imprecise; (4) press subpoenas damage source relationships primarily by compromising the reporter's independent or compatriot status in the eyes of sources rather than by forcing the revelation of sensitive information; (5) only one segment of the journalism profession, characterized by certain reporting traits (emphasis on interpretation and verification) more than type of beat, has been adversely affected by the subpoena threat; (6) reporters feel very strongly that any resolution of their conflicting ethical obligations to sources and to society should be a matter for personal rather than judicial determination, and in consonance with this belief these reporters evince a high level of asserted willingness to testify voluntarily and also a very high level of asserted willingness to go to jail if necessary to honor what they perceive to be their obligation of confidentiality; (7) newsmen prefer a flexible ad hoc qualified privilege to an inflexible per se qualified privilege; (8) newsmen regard protection for the *identity* of anonymous sources as more important than protection for the *contents* of confidential information given by known sources; (9) newsmen object most of all to the frequency with which press subpoenas have been issued in what these reporters regard as unnecessary circumstances when they have no important information to contribute; and (10) newsmen fear that an outright rejection by the Supreme Court of any sort of newsman's privilege would "poison the atmosphere" considerably and thus they regard the symbolic aspect of the current constitutional litigation to be of the utmost importance.